No. 91-1975

Supreme Court, U.S.
FILED
JUN 8 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

BETHLEHEM STEEL CORPORATION,

Petitioner,

vs.

ALVIN JOEL TYLER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Second Circuit Court of Appeals in *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992) ignores the law on burden of proof enunciated by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and conflicts with decisions of other United States Courts of Appeals.

LIST OF PARENT AND SUBSIDIARY COMPANIES

SUBSIDIARY COMPANIES

1 BDR Offshore Corporation
2 BGA Drill Rig Corporation
3 Belem-Administracoes e Panicipacoes Ltda.
4 BethEnergy Mines Inc.
5 BethIntermodal, Inc.
6 Bethlehem Development Corporation
7 Bethlehem Hibbing Corporation
8 Bethlehem Industries Corporation
9 Bethlehem Rail Corporation
10 Bethlehem Roll Corporation
11 Bethlehem Steel Corporation
12 Bethlehem Steel de Mexico, S.A. de C.V.
13 Bethlehem Steel Export Company of Canada, Limited
14 Bethlehem Steel Export Corporation
15 Bethlehem Steel International Corporation
16 Bethlehem Steel (Thailand) Limited
17 BethSystems, Inc.
18 BETHTRAN, Inc.
19 Cambria and Indiana Railroad Company
20 CARRIER EXPRESS, INC.
21 Chesapeake Energy Services, Inc.
22 Conernaugh & Black Lick Railroad Company
23 DDI Transition Company
24 EGL Steel Inc.
25 Eagle Nest Inc.
26 Greenwood Mining Corporation
27 HPM Corporation
28 Hibbing Land Corporation
(c) Hibbing Taconite Company
29 IPV Inc.

30 Interocean Shipping Company
31 Kenacre Land Corporation
32 Manufacturers Water Company, The
33 Marmoraton Mining Company, Ltd.
34 Patapsco & Back Rivers Railroad Company
35 Philadelphia Bethlehem and New England Railroad Company
36 Primeacre Land Corporation
37 South Buffalo Railway Company
38 Steelton & Highspire Railroad Company

DIRECT OWNERSHIP

50% or Less Owned:

1 Chiles-Alexander International Inc.
2 Empreendimentos Brasileiros de Mineracso S.A.-E.B.M.
3 G&A Limited Partnership III - A
4 Griffin-Alexander International, Inc.
5 India Offshore Inc.
6 Indiana Pickling and Processing Company, an Indiana General Partnership
7 Iron Ore Company of Canada
8 CENTEC, a Joint Venture
9 Presque Isle Corporation
10 Restauradora de las Minas de Catorce, S.A. de C.V.
11 Seadrill, Inc.
12 Walbridge Coatings, an Illinois Partnership
13 Rig V Limited Partnership

Over 50% Owned:

1 Ontario Iron Company
2 Rig VI Limited Partnership
3 Bethlehem Singapore Private Limited

INDIRECT OWNERSHIP

Carol Lake Company, Ltd.
Gulf Power Company
Quebec North Shore and Labrador Railway Company Inc.
Remy Metals, Ltd.
Iron Ore Land Company
Northern Land Company, Limited
Schefferville Power Company
Twin Falls Power Corporation Limited
Mineracoes Brasileiras Reunidas-MBR

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GROUNDS FOR JURISDICTION

On March 10, 1992, in *Tyler v. Bethlehem Steel Corporation*, 958 F.2d 1176 (2d Cir. 1992) the United States Court of Appeals for the Second Circuit affirmed the judgment of the United States District Court for the Western District of New York, awarding appellee, Alvin Joel Tyler, $995,000 on his claim of age discrimination following a jury verdict in his favor.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254 (1).

The following statutory provisions involved in this case are set out verbatim in the appendix:

New York Executive Law §§290-301;

Age Discrimination in Employment Act, 29 U.S.C. §§623 and 626;

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5.

STATEMENT OF THE CASE

Plaintiffs Thomas Francis Hughes, Jr. (Hughes) and Alvin Joel Tyler (Tyler) commenced this action against defendant Bethlehem Steel Corporation (Bethlehem) alleging that they were permanently laid off by Bethlehem on the basis of Hughes' disability and on the basis of Hughes' and Tyler's ages, all in violation of the New York Human Rights Law. Jurisdiction of the District Court was based on diversity of citizenship under 28 U.S.C. §1332(a)(1). During the trial, the Court dismissed Tyler's claim of discrimination on the basis of Hughes' disability. Prior to the conclusion of the trial, plaintiff Hughes and Bethlehem settled Hughes' claims. The Court refused to submit Tyler's punitive damages claim to the jury.

Thus, the only claim which was submitted to the jury was Tyler's claim of age discrimination under the New York Human Rights Law. On August 31, 1990, the jury returned a verdict in favor of Tyler in the sum of $995,000.00 consisting of the following components: backpay in the sum of $310,000.00; future lost earnings in the sum of $667,000.00; and damages for emotional distress in the sum of $18,000.00. On September 10, 1990, Bethlehem filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. On September 11, 1990, Tyler filed a motion for a new trial on the issue of the Court's dismissal of his punitive damages claim. By Decision dated June 28, 1991, the District Court denied both motions.

Bethlehem appealed from the judgment of the District Court and, by decision dated March 10, 1992, the Court of Appeals for the Second Circuit affirmed the judgment below.

STATEMENT OF FACTS

Tyler was born on April 12, 1938. He was originally employed by Bethlehem as a salesman in July of 1960. He worked in Bethlehem's Buffalo, New York District Sales Office from 1962 until 1965 as a general product salesman. In 1965, he was transferred to Syracuse, New York, then a sub-office of the Buffalo District Sales Office, where he was employed in the same capacity. He was transferred back to the Buffalo office in 1969, at which time he became a product specialist for bar, rod and wire products.

Tyler continued to work in Buffalo in this capacity until July 10, 1986, when he was permanently laid off at the age of 48. During the last six months of his employment, from approximately January to July of 1986, he had been assigned certain accounts in the Pittsburgh Sales District geographic area, which assignment occupied his time for approximately one week out of the month. Also during that same period of time, Thomas Hughes, one of the salesmen in the Buffalo office, was unable to work, so the Buffalo sales territory was being served only by the Resident Manager and Tyler.

The Buffalo sales office and its Syracuse sub-office had been declining in size for several years. Tyler himself testified that in 1969, when he was transferred out of Syracuse, the office in Syracuse had a Resident Manager, 2 to 3 salesmen and 4 to 5 inside sales personnel. By 1986, the office in Syracuse consisted of one resident salesman. Tyler also testified that in 1970, the Buffalo office had a District Manager, 6 to 10 salesmen and 10 to 12 inside sales personnel. By 1986, the Buffalo office had been downgraded to a Resident office and was staffed only by a Resident Manager, two salesmen, and a

temporary clerical employee. Tyler himself had prepared an analysis recommending that the Buffalo office could be further reduced and had also kept a memorandum outlining the declining tonnage sold out of the Buffalo office.

In July of 1986, the decision was made to further downsize the Buffalo office because of the continuing general decline in Buffalo sales tonnage and the reorientation of Bethlehem's sales effort to focused and dedicated selling, which would remove at least three substantial accounts from the Buffalo office's sales responsibility. The timing of this decision was dictated by the upcoming relocation of the Buffalo sales office and the need to determine how much space would be needed for the new office. At that time, Mr. Janes, the Resident Manager, recommended that Tyler and Hughes be laid off, and their positions, as well as that of the clerical employee, be eliminated. Tyler was 48 years old and Hughes was 47. Lamont Fitzgerald, the Resident Salesman in Syracuse, who was 65 years old and reported to Mr. Janes, was retained. These recommendations were implemented on July 10, 1986. Janes, who was approximately 43 years old, was also retained. Since then, the Buffalo sales force has consisted of Janes in Buffalo and Fitzgerald in Syracuse.

In January of 1985, just over a year prior to the elimination of Tyler's position, Richard D. Sawyer, the Regional Manager of Bethlehem's Central Sales Region, to which Buffalo reported,[1] reduced Tyler's performance evaluation from "good" to "marginal" based on

[1] Mr. Sawyer had been Assistant District Manager and District Manager in Buffalo from 1976 to 1983. During this period Tyler worked under his supervision and he had done Tyler's performance evaluation. Following Mr. Sawyer's departure, the Buffalo office was downgraded from a District office to a Resident office.

customer dissatisfaction with Tyler expressed to Sawyer. At that time, Tyler was told that because of the deficiencies in his performance, he would have six months to improve. Although Tyler did show some improvement in performance over the next several months, his evaluation at the end of 1985 rated him merely "good" and discussed several areas where he required additional improvement. Daniel Land, who was Bethlehem's Manager of Sales and Marketing Administration, testified that he was aware of these critical evaluations of Tyler.

At the time of Tyler's layoff in July of 1986, there were no vacant salesman positions within Bethlehem and 57% of the sales force was over the age of 45. The Company had been downsizing its sales force. Moreover, Land determined, based on the criteria outlined in Bethlehem's memorandum regarding Reductions in Force and on Tyler's recent performance evaluations, that Tyler was not a candidate for possible transfer from the Buffalo office. Land testified that other salesmen who were terminated from their positions were not offered transfers.

Three months after Tyler's termination, in October of 1986, a salesman position opened in Bethlehem's Pittsburgh District Sales Office. David Moules, who was then a salesman for Bethlehem's Johnstown facility, was selected for that position. Moules was approximately 26 and had been employed by Bethlehem since 1982. Moules was selected following an interview by William deHaven, District Manager for the Pittsburgh Office, and his recommendation to Land, Jim VanVliet, Vice-President of Marketing, and C. Adams Moore, Vice-President of Sales. The decision to select Mr. Moules was based on his prior evaluation of "very good" and his interview.

Tyler was not considered for this position because of his laid-off status (his recall would have constituted an "addition to force") and his most recent performance evaluations, which rated him lower than Moules.

While there were no open sales positions at the time of Tyler's termination in July of 1986, there were seventeen transfers of salesmen from one location to another during 1986 and 1987 as a result of promotions, vacancies and similar reasons. None of these transfers arose out of a position elimination. Seven of the transferred salesmen were over 40 at the time. All except three had either "very good" or "outstanding" ratings at the time they were transferred. Except for the transfer to Pittsburgh, Tyler has not claimed that he should have received any of those transfers.

ARGUMENT

Petitioner seeks a writ of certiorari pursuant to 28 U.S.C. §1254(1) on the basis that the decision of the Court of Appeals for the Second Circuit on the issue of the jury instruction is in conflict with the decision of this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and in conflict with the decision of other United States Courts of Appeals.

SUMMARY OF ARGUMENT

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court held that where plaintiff proves that a discriminatory factor played a motivating part in an employment decision, the burden shifts to the defendant to prove by a prepondernace of the evidence that the same employment decision would have been made regardless of the discriminatory motive. This Court held that this standard did not replace the allocation of burden of proof in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), but applied only where there was direct evidence of mixed motive. In this case, by contrast, the Court of Appeals for the Second Circuit held that direct evidence of an impermissible motive is not required to shift the burden of proof to defendant. Therefore, the Second Circuit decision essentially eliminates the distinction between a pretext case and a mixed motive case, disregarding the clear directive of this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and conflicting with the decisions of other Circuit Courts of Appeals.

POINT I

The issue of jury instructions depends on an interpretation of federal law.

Although this case was brought under the Human Rights Law of the State of New York, Executive Law §§290-301, the Second Circuit Court of Appeals analyzed the jury instructions as if the case were commenced under the ADEA or Title VII. The entire decision of the Court of Appeals is based on a consideration of federal law, particularly this Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) and Court of Appeals decisions interpreting it.

POINT II

The District Court's jury instructions were requested by neither plaintiff nor defendant and were improperly based on the *Price Waterhouse v. Hopkins* mixed motive analysis.

Both plaintiff and defendant had proposed a charge to the jury on the parties' respective burdens of proof based on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Neither party proposed an instruction under *Price Waterhouse v. Hopkins*. Yet the Court refused to charge the jury on the standard of proof set forth in *McDonnell Douglas or Burdine*, stating:

> Mr. Gill and Mr. Moravec, as I have indicated to you informally, when I began to think about and review the requests to charge I began to wonder whether or not the requests submitted took adequate account of the Price Waterhouse case, and it seemed to me that more had to be said, that the words such as but for, his age and also statements like determining factors should not be used, and therefore we'll say, motivating factor, instead of determining factor. It appeared to me that if age played a motivating part in Bethlehem's decision at any level, that then the Price Waterhouse direction should come into play, and the burden then is placed upon the defendant to convince the jury by a preponderance of evidence that there were good business reasons for its decision, and so that will be the sense of my charge, and before we go ahead I thought that it would be a good idea to place on the record your views in regard to the changes proposed by the Court.

Defendant objected to the new charge both before and after it was given.

Nevertheless, the Court did not charge pursuant to *McDonnell Douglas,* but adopted a charge based on *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), as follows:

> If you find that plaintiff has failed to prove that his age was a motivating factor in the defendant's decision, then you must find for the defendant. If, however, the plaintiff has established each of the elements of this claim, then you will turn to defendant's defenses as to which the defendant bears the burden by a preponderance of the evidence; that is, if you find that the plaintiff has proven by a preponderance of the evidence that his age was a motivating factor in the defendant's decision to terminate him or refuse to transfer him, he is entitle to recover, unless the defendant establishes by a preponderance of the evidence that it would have taken the same action regardless of plaintiff's age. . . .
>
> I told you before that plaintiff is not required to prove that age was the sole or exclusive motivation for defendant's termination decision. If you find that age was one of the reasons that prompted the defendant to take that action, then you will consider the defendant's defenses as to which the defendant bears the burden of proof by a preponderance of the evidence.

POINT III

Only if there is direct evidence that a discriminatory reason was a motivating factor in an employment decision does the burden shift to the defendant that the same decision would have been made absent the discriminatory reason.

The Second Circuit held that *Price Waterhouse v. Hopkins* does not require a plaintiff to produce direct evidence of a discriminatory animus before shifting the burden of proof to defendant to establish that the same decision would have been made regardless of the discriminatory animus. Instead, the Court held that if the jury could draw an inference that age was a motivating factor, the burden of proof shifts to defendant. This decision of the Second Circuit effectively repudiates *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in conflict with the decision of this Court in *Price Waterhouse v. Hopkins* and with the decisions of several other Circuits.

A. *Price Waterhouse v. Hopkins*

In *Price Waterhouse v. Hopkins*, the District Court concluded that, based on direct statements by the decisionmakers, plaintiff established that impermissible sex stereotyping was a factor in the decision not to elect the plaintiff into partnership. The evidence presented by plaintiff in *Price Waterhouse v. Hopkins* was summarized as follows:

> There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as 'macho' (Defendant's Exh 30); another suggested that she "overcompensated for being a

> woman" (Defendant's Exh 31); a third advised her to take "a course at charm school" (Defendant's Exh 27). Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Tr 321. Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." Defendant's Exh 27. But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the coup de grace; in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 618 F. Supp. at 1117.

490 U.S. at 235-36.

The Court held that, in the face of such direct evidence that the decisionmakers had placed substantial negative reliance on illegitimate criteria, the burden of proof shifted to defendant to establish by a preponderance of the evidence that the same decision would have been reached absent the impermissible factor. In the present case, however, the Court of Appeals concluded that because neither the plurality opinion nor the concurrence by Justice White specifically stated that direct evidence of discriminatory motivation was required, direct evidence was *not* required. This Court, however, summarized the direct nature of the evidence presented in the case as follows:

> Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually

> relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks. On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations. This is not, as Price Waterhouse suggests, "discrimination in the air"; rather, it is, as Hopkins puts it, "discrimination brought to ground and visited upon" an employee. Brief for Respondent 30. By focusing on Hopkins' specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, "standing alone," would or would not establish a plaintiff's case, since such a decision is unnecessary in this case. But see post, at 277, 104 L Ed 2d, at 305 (O'Connor, J., concurring in judgment). *Id.* at 251-52.

Thus, the plurality opinion implicitly adopted the direct evidence criteria specified in Justice O'Connor's concurring opinion:

> Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, see *Meritor Savings Bank v. Vinson*, 477 US 57, 63-69, 91 L. Ed. 2d 49, 106 S.Ct. 2399 (1986), cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. In addition, in my view testimony such as Dr. Fiske's in this case, standing alone, would not justify shifting the burden of persuasion to the

> employer. Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of" sex. What is required is what Ann Hopkins showed here: *direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion on reaching their decision.* (emphasis added). *Id.* at 277.

In summary, this Court held that there must be direct evidence of an impermissible motive before the Court can shift the burden of proof to the defendant in a Title VII or ADEA case.

Moreover, as recognized in the opinion of the Court of Appeals in this case, most of the Circuit Courts have held that direct evidence is required before shifting the burden of proof to defendant. In *Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991), *reh'g denied*, 1992 U.S. App. Lexis 11747 (8th Cir. 1991) the Eighth Circuit required direct evidence before applying the. burden-shifting standards of *Price Waterhouse*. Similarly in *Burns v. Gadsen State Community College*, 908 F.2d 1512, 1518-19 (11th Cir. 1990), the 11th Circuit held that when a plaintiff attempts to prove a claim through circumstantial evidence, the analytical framework established in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) is properly used. It is only where there is direct evidence of discriminatory motive that the burden helping standard of *Price Waterhouse* comes into play. *See also Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 49 (3d Cir. 1989).

The Seventh Circuit Court of Appeals has rendered conflicting opinions on the issue. In *Karanzanos v. Navistar,* 948 F.2d 332, 335 (7th Cir. 1991), Justice Bauer states, without citation, that "[a plaintiff] may try to meet his burden head on by presenting direct or circumstantial evidence that age was the determining factor in his discharge." However, in the subsequent decision in *Bruno v. City of Crown Point, Ind.,* 950 F.2d 355, 361 (7th Cir. 1991), Justice Manion states that to invoke the *Price Waterhouse* standard, a plaintiff must provide direct evidence of discrimination. *See also, McCarthy v. Kemper Life Ins. Co.,* 924 F.2d 683, 686 (7th Cir. 1991).

The Courts of Appeals for the 1st, 10th and 11th Circuits have also required direct evidence to justify a shifting of the burden of proof under *Price Waterhouse. Jackson v. Harvard University,* 900 F.2d 464, 467 (1st Cir. 1990), *cert. denied,* _____ U.S. _____, 112 L. Ed.2d 104 (1990) required direct evidence, defined as "evidence which, in and of itself, shows a discriminatory animus." In *Ramsey v. City and County of Denver,* 907 F.2d 1004, 1008 (10th Cir. 1990), the Court held that *Price Waterhouse* requires direct evidence of discriminatory conduct. In *Caban Wheeler v. Elsea,* 904 F.2d 1549, 1554 (11th Cir. 1990) the Court held that *Price Waterhouse v. Hopkins* requires a plaintiff to produce direct evidence of discrimination, explaining that, "[D]irect evidence relates to actions or statements of an employer reflecting a discriminatory attitude correlating to the discrimination or retaliation complained of by the employee."

As noted in its opinion, the Second Circuit itself has previously required direct evidence of discrimination. In *Tyler, supra,* the Court stated:

In a prior ADEA case following *Price Waterhouse*, we said that

> [o]nce the plaintiff establishes by direct evidence that an illegitimate factor played a motivating or substantial role in an employment decision, the burden falls to the defendant to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegitimate factor into account.

Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1568 (2d Cir. 1989). *See also Jund v. Town of Hempstead*, 941 F.2d 1271, 1289 (2d Cir. 1991); *Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 116 (2d Cir. 1991). Recently, we have equated "direct evidence" with evidence that "shows that the impermissible criterion played some part in the decision-making process." *Barbano v. Madison County*, 922 F.2d 139, 145 (2d Cir. 1990). 958 F.2d at 1183.

In conclusion, this Court held in *Price Waterhouse v. Hopkins* that plaintiff must provide direct evidence of an impermissible motive before the burden shifts to defendant to prove that the same decision would have been made absent the impermissible motive. Virtually every Circuit has held that Price Waterhouse requires direct evidence of discrimination. If this were not the case, the distinction between mixed motive cases and pretext cases would be eradicated and the *McDonnell Douglas* analysis would be eliminated as a viable test.

POINT IV

The evidence presented by Tyler in this case is not direct evidence of discrimination.

In finding that no direct evidence was required to shift the burden of proof to defendant, the Second Circuit opinion holds that since "a jury may reach its ultimate conclusion on the issue of discrimination through 'direct' or 'circumstantial' evidence" they are equivalent and either form is sufficient. Not only does this reasoning completely disregard the long standing and universally recognized distinction between direct and circumstantial evidence, but as noted, *supra*, it is in direct conflict with the opinion in *Price Waterhouse* and the opinion of other Circuit Courts that have addressed this issue.

In apparent awareness of this conflict, the Second Circuit discusses the alleged "direct" evidence produced by Tyler and concludes that, in any event, it is sufficient to shift the burden of proof to defendant. In *Tyler*, the Court states as follows:

> Given the general verdict for Tyler on liability, the jury necessarily found that age was a motivating factor in Bethlehem's decision to fire Tyler and not transfer him. Similarly, the jury necessarily rejected Bethlehem's affirmative defense that tightening economic conditions would have compelled the same decision. These conclusions are amply supported by the evidence. Bethlehem's own witness, Daniel Land, testified that Bethlehem's sales force was getting too old; Tyler's layoff helped decrease the average age of Bethlehem's sales force. The internal memorandum recommending Tyler's layoff listed his age and years of service. The position which Tyler was filling in Pittsburgh, on a part-time basis, was left unfilled until Bethlehem could place the 26-year-old Moules in it. The performance appraisals of the Bethlehem employees who *were* allowed to transfer

> indicate not only that they were all younger than Tyler, but also that Bethlehem had a special category of employees known as "Young Tigers"—an evaluative category from which a long-in-the-tooth employee like Tyler was by definition excluded. 958 F.2d at 1186-87.

At best, this conclusion misreads the record. Mr. Land in no way characterized the age of Bethlehem's sales force in a negative light; rather, he responded to a question with a statement of fact with no evidence of a discriminatory attitude. The statement about a "young tiger", made in relation to another employee by a supervisor totally uninvolved in the decision at issue in this case, is a stray remark not made by the decisionmaker and similar to the "lady candidates" example posited by Justice O'Connor in Price Waterhouse. This is not the type of direct evidence required by either this Court or by the Second Circuit itself in its prior decisions. For example, in *Barbano v. Madison County*, 922 F.2d 139 (2d Cir. 1990), the court held that the plaintiff had established by direct evidence that an illegitimate factor played a part in the decision. In that decision, the direct evidence was summarized as follows:

> Before entering the interview, Barbano heard someone say, "Here are copies of the next resume," followed by the comment, "Oh, another woman." The interview began, and after Barbano stated why she thought she was qualified for the job, Greene said that he would not consider "some woman" for the position. Greene then asked Barbano her plans on having a family and whether her husband would object to her transporting male veterans. Barbano said the questions were irrelevant and discriminatory. No one responded, except for Greene, who insisted on answers to his questions. Barbano again protested that the questions were

> discriminatory. Greene replied that the questions were relevant because he did not want to hire a woman who would get pregnant and quit. Newbold also said the questions were relevant. None of the interviewers rebuked Greene, objected to the questions or told Barbano that she need not answer them. Barbano stated that if she decided to have a family she would take no more time off than medically necessary. Greene once again asked whether Barbano's husband would object to her "running around the country with men" and said he would not want his wife to do it. Barbano said she was not his wife. The interview concluded after Barbano asked some questions about insurance. *Id.* at 141-42.

Similarly, in *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564 (2d Cir. 1989) the Second Circuit found that there was direct evidence that age played a part in the defendant's decision to terminate the plaintiff. The Court summarized the evidence as follows:

> Grant presented direct evidence that age played a part in HSCC's actions. Not only did the March 23 memo state that Hazelett was looking for a "young man *** between 30 and 40 years old", but several witnesses testified that similar statements were made by Hazelett and others. At one point, Hazelett told Grant, "I want a young man and that's what I want and that's what I'm going to have." Furthermore, the company's asserted justifications for preferring a younger controller abound with age stereotypes, such as the belief that older workers are less productive or "wouldn't want Bill telling them what to do". Cf. *Price Waterhouse*, 109 S. Ct. at 1793-95 (comments reflecting sex stereotyping constitute direct evidence of impermissible motive).

Id. at 1569.

The evidence in this case is not the direct evidence required by *Price Waterhouse*. As stated by Justice O'Connor in *Price Waterhouse*, remarks by nondecisionmakers, and even remarks by decisionmakers unrelated to the decision making process itself do not constitute direct evidence of discrimination. Moreover, other Circuit Courts addressing this issue have held that direct evidence requires statements by the decisionmakers reflecting a discriminatory or retaliatory attitude. *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990); *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990), *cert. denied*, _____ U.S. _____, 112 L.Ed. 2d 104 (1990). In the instant case, the evidence relied on by the Second Circuit is, at best, inferential evidence. The evidence is not related to the decision to terminate Tyler when his position in Buffalo was eliminated in July of 1986, nor is it related to the decision not to offer him a job in Pittsburgh when that position became available in October of 1986. Indeed, Tyler himself never testified to any statement or remark of any kind indicating a negative attitude directed at him based on his age.

CONCLUSION

The decision of the Second Circuit obliterates the distinction between mixed-motive and pretext cases by permitting an instruction under *Price Waterhouse v. Hopkins* regardless of whether a plaintiff presents direct evidence of discrimination. This decision is in conflict with the *Price Waterhouse v. Hopkins* decision as well as the decisions of most other Circuits that have considered this issue. For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Decision of the United States Court of Appeals for the Second Circuit (Tyler v. Bethlehem Steel Corporation, 958 F.2d 1176 (2d Cir. 1992))

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 733, 920—August Term 1991

Argued: January 6, 1992 Decided: March 10, 1992

Docket Nos. 91-7908, 91-7918

ALVIN JOEL TYLER,

Plaintiff-Appellee Cross-Appellant,

—against—

BETHLEHEM STEEL CORPORATION,

Defendant-Appellant Cross-Appellee.

Before:

OAKES, *Chief Judge*,
PRATT and MINER, *Circuit Judges*.

Bethlehem Steel Corporation appeals from a September 13, 1991, judgment of the United States District Court for the Western District of New York, John T. Curtin, *Judge*,

entered on a jury verdict awarding Alvin Joel Tyler $995,000 on his claim of age discrimination brought under New York State's Human Rights Law, N.Y. Exec. Law § 290 *et seq*. Tyler cross-appeals from the district court's judgment to the extent that it granted a directed verdict dismissing his claim for punitive damages.

We affirm.

THOMAS S. GILL, Buffalo, NY (Saperston & Day, P.C., Thomas F. Knab, of Counsel), *for Plaintiff-Appellee Cross-Appellant.*

MICHAEL R. MORAVEC, Buffalo, NY (Phillips, Lytle, Hitchcock, Blaine & Huber, David K. Floyd, of Counsel), *for Defendant-Appellant Cross-Appellee).*

PRATT, *Circuit Judge*:

Twenty-two-year-old Alvin Joel Tyler went to work for Bethlehem Steel Corporation on July 5, 1960. After 26 years of service, Bethlehem on July 10, 1986, fired him, or as the corporation put it, placed him on "permanent layoff". In this diversity case brought under New York's Human Rights Law, N.Y. Exec. Law §§ 290-301 (McKinney 1982 & Supp. 1992), a jury awarded Tyler $995,000 in damages for age discrimination.

On appeal, Bethlehem claims that the jury's verdict was against the weight of the evidence, that the district court improperly allocated the burdens of proof in its instruc-

tions, that the jury's award was speculative and based on erroneously-admitted expert testimony, and that the issue of "front pay" is an equitable one which should not have been sent to the jury. On his cross-appeal, Tyler contends that Judge Curtin should have allowed his claim for punitive damages to go to the jury. We reject all of these arguments and affirm the judgment of the district court.

FACTS AND BACKGROUND

When Bethlehem fired the 48-year-old Tyler in 1986, he was serving as a general products salesman. Officially assigned to Bethlehem's Buffalo office, Tyler had also been working in Bethlehem's Pittsburgh office approximately one week every month, "because they were short of people down there and they needed sales personnel". The Pittsburgh office was busy: there, Tyler had "more work th[a]n I could handle".

Starting sometime around 1970, Bethlehem developed a performance appraisal system for its employees. Under this system, employees would be ranked "outstanding", "very good", "good", "acceptable", "marginal", "unsatisfactory", or "not rated" (for those "too new on the job" to evaluate). From 1970 through 1984, all of Tyler's performance appraisals were at least "very good", if not "outstanding".

On November 28, 1984, resident sales manager Edwin W. Janes conducted Tyler's appraisal and ranked him "very good". But two months later, regional sales manager Michael D. Sawyer, who was located in Cleveland and had not observed Tyler's performance in 1984, decided to re-appraise Tyler because of complaints from two of Tyler's customers. Sawyer downgraded Tyler's

overall rating to "marginal", indicated that "Tyler's performance has continued to deteriorate", and concluded that "without an immediate improvement in his performance, I recommend he be terminated in six months". Tyler generally disputed the allegations contained in Sawyer's re-appraisal.

During 1985, Tyler worked with Janes to improve the areas Sawyer had identified as deficient. At these meetings, Janes was "generally complimentary" and indicated that Tyler was making "good progress". Tyler survived the six-month termination deadline (characterized by Bethlehem as a "probationary period"), and continued to work for Bethlehem. For 1985, Janes evaluated Tyler as "good".

On June 27, 1986, Janes sent a memorandum to W.T. deHaven, district manager of Bethlehem's Pittsburgh sales office, recommending that Bethlehem shut down the Buffalo sales office. He made a number of other recommendations, including "Lay off A.J. Tyler (Age 48, twenty-six years service)." Sawyer testified that age and years of service were factors relevant to Bethlehem's pensions, savings plans, and insurance levels.

On July 9, 1986, while Tyler was on vacation, Janes called him and told him to come into the office the next day to meet with both Janes and Sawyer. At that meeting, Janes and Sawyer informed Tyler that Bethlehem was closing its Buffalo sales office for economic reasons, and that Tyler was to be permanently laid off. Tyler asked if there was any possibility of a transfer to the Pittsburgh sales office, but Janes and Sawyer said there were no transfer possibilities.

In fact, a short time before Tyler's termination, Sawyer had inquired of deHaven about a transfer for Tyler.

Although there was an opening in the Pittsburgh office at that time, deHaven said he was going to transfer Frank Weber, a 47-year-old customer sales assistant, into that position. However, Weber was not transferred, and the Pittsburgh sales position was left vacant until October 1, 1986, when it was given to David Moules, a 26-year-old wire salesman with only four years' service. Moules had already resigned from Bethlehem once, was dissatisfied with his position as a wire salesman with Bethlehem, and eventually quit the general sales position in June 1987. Thus, Bethlehem fired the 48-year-old Tyler after denying his request for a transfer to Pittsburgh, a transfer it soon gave to a relatively inexperienced, disgruntled salesman barely half Tyler's age.

Between July 1986 and November 1987, Bethlehem transferred a total of 13 sales people, all of them younger than Tyler. One of the two oldest was Weber, who finally gained the Pittsburgh sales position when Moules quit. In making its transfer decisions, Bethlehem relied on several factors, one of which was the performance appraisal, several of which referred to the employees' "youth" in a positive manner. One candidate, 25 years old at the time, was given the following accolade:

> All indications point to "Young Tiger" classification. We will continue to follow closely; feel we have a future "High Potential" individual here.

After Tyler was fired, Bethlehem hired 12 new sales representatives and put them through Bethlehem's training program. Ten of the 12 were hired directly from college campuses. Daniel Land, Bethlehem's manager of sales and marketing administration, explained why:

> [W]e have had a lot of unplanned attrition during the time period of 1982 to the present. We have seen the demographics of our sales organization shift gradually upwards so that, as I [explained] earlier, some 56, 57 percent of our sales force is now between the ages of 45 and over. * * * [W]e are providing for the time when our sales force continues to age and gets to be—a greater percentage of them that are currently eligible for retirement then become eligible for retirement.

After trial, the jury found for Tyler in the sum of $995,000 broken down as follows: $310,000 for back pay, $667,000 for future lost earnings ("front pay"), and $18,000 for emotional distress. Bethlehem moved for judgment *non obstante veredicto*, or in the alternative, for a new trial. Tyler cross-moved for a new trial solely on the district court's refusal to submit his punitive damages claim to the jury. Judge Curtin denied both motions, and these cross-appeals followed.

DISCUSSION

A. *The Jury Instruction*

Bethlehem's challenge to the "*Price Waterhouse*" instruction given to the jury draws us into the murky water of shifting burdens in discrimination cases. Judge Curtin instructed the jury:

> If you find that plaintiff has failed to prove that his age was a motivating factor in the defendant's decision, then you must find for the defendant. If, however, the plaintiff has established each of the elements of this claim, then you will turn to defen-

> dant's defenses as to which the defendant bears the burden by a preponderance of the evidence; that is, if you find that the plaintiff has proven by a preponderance of the evidence that his age was a motivating factor in the defendant's decision to terminate[ ] him or refuse to transfer him, he is entitled to recover, unless the defendant establishes by a preponderance of the evidence that it would have taken the same action regardless of plaintiff's age.

While this action was commenced as a diversity action under New York's Human Rights Law, *see* N.Y. Exec. Law §§ 290-301 (1982 & Supp. 1992), both parties agree that the elements of proof of liability for a case commenced under § 297(9) have been the same as those required under the federal age discrimination in employment act ("ADEA"); New York courts have consistently looked to federal caselaw in expounding the Human Rights Law. *See, e.g., Miller Brewing Co. v. State Div. of Human Rights*, 66 N.Y.2d 937, 938-39, 489 N.E.2d 745, 746-47, 498 N.Y.S.2d 776, 777-78 (1985); *Grumman Aerospace Corp. v. New York State Div. of Human Rights*, 151 A.D.2d 573, 573, 542 N.Y.S.2d 681, 682 (2d Dep't 1989) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)); *Ioele v. Alden Press, Inc.*, 145 A.D.2d 29, 35, 536 N.Y.S.2d 1000, 1003 (1st Dep't 1989). This makes sense, because the ultimate goals of the fact-finders in both federal and New York age discrimination actions are the same—to determine whether an adverse employment decision was made "because of" age. *Compare* 29 U.S.C. § 623(a)(1) *with* N.Y. Exec. Law § 296(1)(a). Similarly, our interpretations of the ADEA have relied on interpretations of title VII, "for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.' " *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121

(1985) (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)). For this reason, we may analyze the jury instruction issue as if this were a case commenced under the ADEA or title VII.

Bethlehem characterizes the challenged instruction as a "*Price Waterhouse*" instruction and claims that it was error for Judge Curtin to give it, because *Price Waterhouse* requires the plaintiff to produce "direct evidence" of discrimination before the defendant can be saddled with the burden of proving that the same action would have been taken even in the absence of impermissible factors, and, according to Bethlehem, Tyler did not produce such "direct evidence". Although he did not request a "*Price Waterhouse*" instruction himself, Tyler argues that the given instruction was justified by the evidence.

To properly address Bethlehem's argument, we need to consider three threshold problems. First, what are the differences between "pretext" and "mixed-motives" cases? Second, what are the holdings of *Price Waterhouse*? Third, what is "direct evidence" of discrimination? We address these issues *seriatim* before we reach the ultimate issue of whether the given jury instruction was erroneous.

1. "Pretext" or "mixed-motives"? Employment discrimination cases (whether brought under title VII or the ADEA) are frequently said to fall within one of two categories: "pretext" cases and "mixed-motives" cases. *See Price Waterhouse*, 490 U.S. at 247 n.12. *See also Holo-Krome Co. v. NLRB*, No. 91-4061, slip op. 1141, 1142-43 (2d Cir. Jan 17, 1992).

a. "Pretext" cases. In "pretext" cases, the plaintiff must present facts sufficient to remove the most likely *bona fide* reasons for an employment action—the familiar *McDonnell Douglas v. Green* factors. 411 U.S. 792, 802

(1973). *See also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 & 253 n.6 (1981). Once the plaintiff has met this burden of establishing a prima facie case (which "is not onerous", *Burdine*, 450 U.S. at 253), a defendant must then "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Burdine*, 450 U.S. at 254. The defendant's task is merely to *articulate* (not *prove*), via admissible evidence, a legitimate reason for the employment decision. We have called this a "burden of production". *See, e.g., Holo-Krome*, slip op. at 1143. This frames the ultimate issue for the plaintiff (did intentional discrimination occur?) with greater clarity. At that point, the plaintiff must have the opportunity to demonstrate that the employer's proffered reason was not the "true reason" for the employment decision. *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804. This may be done either by persuading the trier of fact that a discriminatory reason more likely than not motivated the employer, or by persuading the trier of fact that the employer's proffered explanation is unworthy of belief. *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 805.

b. "Mixed-motives" cases. If a plaintiff can convince the trier of fact that an impermissible criterion in fact entered into the employment decision, a somewhat different analysis takes place. In such a "mixed-motives" case, the plaintiff must initially show more than the "not onerous" *McDonnell Douglas-Burdine* factors. Should the plaintiff wish to prove his case as a "mixed-motives" case, he must focus his proof directly at the question of discrimination and prove that an illegitimate factor had a "motivating" or "substantial" role in the employment decision. *Price Waterhouse*, 490 U.S. at 258 (opinion of

Brennan, Marshall, Blackmun, and Stevens, JJ.); *id.* at 259 (White, J., concurring) (quoting *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977)); *Price Waterhouse*, 490 U.S. at 261-62 (O'Connor, J., concurring). *See Mt. Healthy*, 429 U.S. at 287. If the plaintiff convinces the factfinder that the illegitimate factor played such a role, the employee has proved that the decision was made at least in part "because of" the illegitimate factor. At this point the employee is entitled to succeed subject only to the employer's opportunity to prove its "affirmative defense", *see Price Waterhouse*, 490 U.S. at 246 (opinion of Brennan, Marshall, Blackmun, and Stevens, JJ.); that is, "that it would have reached the same decision as to [the employee's employment] even in the absence of the" impermissible factor. *Mt. Healthy*, 429 U.S. at 287; *Price Waterhouse*, 490 U.S. at 244-45 (opinion of Brennan, Marshall, Blackmun, and Stevens, JJ.); *id.* at 259 (White, J., concurring); *id.* at 276-77 (O'Connor, J., concurring). *See Holo-Krome*, slip op. at 1143.

c. The Civil Rights Act of 1991. In late November of last year, congress culminated a two-year political struggle with the passage of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Section 107 of that act is addressed to one of the problems created by the split opinions in *Price Waterhouse*, and it amends title VII with this language: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." This amendment embraces the same "motivating factor" standard for mixed-motives cases which we divine, *infra*, from the sundry opinions in *Price Waterhouse*.

In the same statute congress also provided for jury trials in title VII cases, overruling a consistent line of precedent, *e.g.*, *Lehman v. Nakshian*, 453 U.S. 156, 164 (1981), which held to the contrary. *See* Civil Rights Act of 1991, Pub. L. 102-166, § 102 (to be codified at 42 U.S.C. § 1981A(c)(1)).

Moreover, by this 1991 act, congress has added a remedial twist to the picture: if a plaintiff proves that the impermissible factor was a "motivating factor" for the employment practice, but the defendant proves the "affirmative defense", *cf. Price Waterhouse*, 490 U.S. at 246 (opinion of Brennan, Marshall, Blackmun, and Stevens, JJ.), that it "would have taken the same action in the absence of the impermissible motivating factor", the court may still grant declaratory or injunctive relief, as well as attorney's fees and costs, *see* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(b)(3) (to be codified at 42 U.S.C. §2000e-5(g)(2)(B)(i)), even though it is forbidden from "award[ing] damages or issu[ing] an order requiring any admission, reinstatement, hiring, promotion, or payment". *Id.*, §107(b)(3) (to be codified at 42 U.S.C. § 2000e-5(g)(2)(B)(ii)). We decline to express any opinion on the meaning of the 1991 act, because (1) there is currently a conflict among the EEOC and several courts regarding the retroactivity of the 1991 act, *compare*, *e.g.*, *Mojica v. Gannett Co.*, 779 F. Supp. 94, 99 (N.D. Ill. 1991) (retroactive) *with*, *e.g.*, *Van Meter v. Barr*, 778 F. Supp. 83, 86 (D.D.C. 1991) (not retroactive) *and* E.E.O.C. Notice No. 915.002 (Dec. 27, 1991) (not retroactive); (2) regardless of the act's retroactivity, we reach the same result on the issue of "mixed-motives" analysis; (3) as applied to the Human Rights Law, New York courts have yet to cast their lot with the new act and it would be presumptuous for us to assume that the state courts, without

legislative direction, would incorporate this new federal statute into its Human Rights Law jurisprudence; (4) the Human Rights Law treats remedies in many respects differently than does federal law; and (5) there may be case-and-controversy difficulties with the remedial portion of this act which allows a plaintiff without a personal stake in the litigation to act as a private attorney general for purposes of obtaining declaratory or injunctive relief.

Because New York courts have in the past turned to federal law for guidance in administering the Human Rights Law, this amendment may have potential importance for future cases under the New York law. However, since New York courts have not yet spoken on the subject, we will not attempt to apply the new federal statute in this case.

2. Price Waterhouse. Our initial problem is created by the various *Price Waterhouse* opinions. While that case engendered four separate opinions in the Supreme Court, none commanded a majority of the justices. *See Price Waterhouse*, 490 U.S. at 231 (opinion of Brennan, Marshall, Blackmun, and Stevens, JJ.); *id.* at 258 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring); *id.* at 279 (Kennedy, J., dissenting) (joined by Rehnquist, C.J. and Scalia, J.). Our duty is to follow the Supreme Court's holding, but with a six-justice majority splintered 4-1-1 in its reasoning, determining the precise holdings of *Price Waterhouse* is not an easy task. While we might be more reserved in expressing our frustration, one commentator has aptly summed up our predicament: "More than a mere agreement on the result is needed; without a majority rationale for the result, the Supreme Court abdicates its responsibility to the institutions and parties depending on it for direction. Each plurality decision thus represents a failure to fulfill the Court's obligations." Note, *Plurality*

Decisions and Judicial Decisionmaking, 94 Harv. L. Rev. 1127, 1128 (1981). *See generally* John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 Duke L.J. 59.

We are thus left with the unenviable task of divining the rationale of a Court which in fact had no single *ratio decidendi*. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). *See also Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 808 n.33 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *United States v. Martino*, 664 F.2d 860, 872-73 (2d Cir. 1981), *cert. denied*, 458 U.S. 1110 (1982). In essence, what we must do is find common ground shared by five or more justices. This is an especially important task in this case because Bethlehem claims that Tyler's burden as a result of *Price Waterhouse* was to show "direct evidence" that age was a substantial or motivating factor to merit the given jury instruction—a concept present in Justice O'Connor's separate concurring opinion, *see Price Waterhouse*, 490 U.S. at 271, 275, 276 (O'Connor, J., concurring), and embraced in the dissent's interpretation of the Court's holding. *See id.* at 280, 290 (Kennedy, J., dissenting). The requirement of "direct evidence" was not, however, adopted either by the plurality of four or by Justice White, so there was not majority support for this proposition. *See Hyatt Corp. v. NLRB*, 939 F.2d 361, 374 n.5 (6th Cir. 1991). In short, "direct evidence" was *not* a

requirement imposed by the majority in *Price Waterhouse*. We will revisit this problem later.

The Court's split in *Price Waterhouse* was 4-1-1-3, with Justices White and O'Connor each "concurring in the judgment" with separate opinions. Naturally, both Justices White and O'Connor shared some common ground with the four-member plurality, but Justice White differed with the plurality only as to the specifics of the employer's burden. *Price Waterhouse*, 490 U.S. at 261 (White, J., concurring). In all other respects, Justice White agreed with the plurality that *Mt. Healthy* provided the proper framework for analyzing "mixed-motives" cases (*i.e.* where the plaintiff convinces the trier of fact "that the employer was motivated by both legitimate and illegitimate factors." *Price Waterhouse*, 490 U.S. at 259 (White, J., concurring)). Thus, before we consider further the problem of "direct evidence", we can conclude that a majority of the Supreme Court endorsed, in *Price Waterhouse*, the burden-shifting framework for mixed-motives cases that was articulated in *Mt. Healthy*.

3. The problem of direct evidence. In any event, the Civil Rights Act of 1991 does not address our biggest problem: whether *Price Waterhouse* requires the plaintiff to show "direct evidence" of discrimination as a precondition to shifting into mixed-motives analysis. Despite the inarguable fact that only *four* justices in *Price Waterhouse* would have imposed a "direct evidence" requirement for "mixed-motives" cases, most circuits have engrafted this requirement into caselaw. However, the various circuits have about as many definitions for "direct evidence" as they do employment discrimination cases. We have not been immune from this ourselves. In a prior ADEA case following *Price Waterhouse*, we said that

> [o]nce the plaintiff establishes by direct evidence that an illegitimate factor played a motivating or substantial role in an employment decision, the burden falls to the defendant to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegitimate factor into account.

Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1568 (2d Cir. 1989). *See also Jund v. Town of Hempstead*, 941 F.2d 1271, 1289 (2d Cir. 1991); *Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 116 (2d Cir. 1991). Recently, we have equated "direct evidence" with evidence that "shows that the impermissible criterion played some part in the decision-making process." *Barbano v. Madison County*, 922 F.2d 139, 145 (2d Cir. 1990). Bethlehem, however, would have us define "direct evidence" as non-"circumstantial" evidence. But "the basic problem with this touchstone is that 'direct evidence' of intent cannot exist, at least in the sense of evidence which, if believed, would establish the ultimate issue of intent to discriminate." Charles A. Sullivan, *Accounting For* Price Waterhouse: *Proving Disparate Treatment Under Title VII*, 56 Brook. L. Rev. 1107, 1138 (1991). *See Barbano*, 922 F.2d at 144-45.

We can, however, understand Bethlehem's confusion. Normally, "direct evidence" is described as evidence tending to show, without resort to inference, the existence of a fact in question. This is often contrasted with "circumstantial", or "indirect" evidence, which requires the factfinder to take certain inferential steps before the fact in question is proved. But, as Judge Posner correctly remarked in a recent ADEA case, "all knowledge is inferential". *Visser v. Packer Engineering Assoc., Inc.*, 924 F.2d 655, 659 (7th Cir. 1991) (*en banc*). *Compare*

Karazanos v. Navistar Int'l Transp. Corp., 948 F.2d 332, 335 (7th Cir. 1991) (plaintiff "may try to meet his [*Price Waterhouse*] burden head on by presenting direct *or circumstantial* evidence that age was the determining factor in his discharge") (emphasis added); *Visser*, 924 F.2d at 664 n.1 (Cudahy, J., dissenting) ("Incidentally, one may get into mixed motive analysis by presenting either direct *or* circumstantial evidence.") (emphasis in original); *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991) (reading *Price Waterhouse* as defining "direct evidence" in the negative; *i.e.*, not "stray remarks in the workplace", "statements by nondecisionmakers", or "statements by decisionmakers unrelated to the decisional process itself"); *Burns v. Gadsden State Comm. College*, 908 F.2d 1512, 1518-19 n.9 (11th Cir. 1990) (*per curiam*) (discriminatory remarks which "involv[ed] the kind of position for which the plaintiff applied", though not directed at plaintiff, were "direct evidence of discriminatory motive"); *and Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989) (equating "direct evidence" with "smoking gun") *with Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting) ("Courts will also be required to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence."); *Bruno v. City of Crown Point, Indiana*, 950 F.2d 355, 361 (7th Cir. 1991) ("Under *Price Waterhouse*, the plaintiff has the initial burden of proving by direct evidence that an impermissible factor * * * played a motivating part in an employment decision."); *Ramsey v. City and County of Denver*, 907 F.2d 1004, 1008-09 (10th Cir. 1990); *Young v. City of Houston*, 906 F.2d 177, 180-81 (5th Cir. 1990) (identifying and deftly avoiding the problem); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990) ("direct evidence relates to actions or state-

ments of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee"); *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir.) ("Direct evidence is evidence which, in and of itself, shows a discriminatory animus."), *cert. denied*, 111 S. Ct. 137 (1990); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 315-16 (6th Cir. 1989).

Requiring "direct evidence", *i.e.*, non-"circumstantial" evidence, as a precondition to shifting into the mixed-motives analysis runs afoul of more general evidentiary principles. "Conventional rules of civil litigation generally apply in Title VII cases", *Price Waterhouse*, 490 U.S. at 253, and presumably, the same goes for ADEA cases. One of those conventional rules is that "in any lawsuit, the plaintiff may prove his case by direct *or* circumstantial evidence." *United States Postal Serv. Bd. of Govs. v. Aikens*, 460 U.S. 711, 714 n.3 (1983) (emphasis added). *See, e.g., O'Brien v. National Gypsum Co.*, 944 F.2d 69, 72 (2d Cir. 1991) ("it is beyond any doubt that circumstantial evidence alone may suffice to prove adjudicative facts"); *United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989) ("Circumstantial evidence, it should be noted, if relied upon by the jury, is of no lesser probative value than direct evidence."), *cert. denied*, 493 U.S. 1081 (1990); 1A John Henry Wigmore, *Evidence in Trials at Common Law* § 24, at 944-52 (Tillers rev. 1983); Edward W. Cleary, *McCormick on Evidence* § 185, at 543 (3d ed. 1984); Richard O. Lempert & Stephen A. Saltzburg, *A Modern Approach to Evidence* 150-51 (2d ed. 1983). If a jury can give equal or greater weight to circumstantial evidence, then requiring only "direct" evidence to sustain a plaintiff's burden of proof is not only unhelpful, it is baffling. Juries are frequently (and correctly) instructed,

as they were here, that "[t]he law makes no distinction between the weight to be given to either direct or circumstantial evidence." 1 Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice and Instructions* § 15.02, at 441-42 (3d ed. 1977). *See* 3 Leonard B. Sand *et al.*, *Modern Federal Jury Instructions* ¶ 74.01, at 74-7 (1991); U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions: Civil Cases* § 2.18, at 22 (1991).

Can these seemingly irreconcilable requirements be reconciled? Perhaps we should remember that it is a *statute*, not caselaw, that we are examining. New York's Human Rights Law, like the ADEA and title VII, is not a complex statute. All three of these statutes prohibit employers from making employment decisions "because of" age or other prohibited factors. A jury instruction need simply instruct the jury consonant with the statute. *McDonnell Douglas*, *Burdine*, and *Price Waterhouse* may be useful analytic constructs for district judges making nonjury decisions or ruling on motions for summary judgment, but we must remember that they are just that. All three were presented to the Supreme Court as title VII cases, where the option of a jury trial was formerly nonexistent. *See Lehman v. Nakshian*, 453 U.S. at 164; George Rutherglen, *Major Issues in the Federal Law of Employment Discrimination* 6-7 (Federal Judicial Center 2d ed. 1987). When a case is submitted to a jury, and the jury then concludes that a preponderance of *all* of the evidence (of whatever kind) shows that age was a motivating factor in the employer's decision, that is enough for the jury to shift its glance to the employer and require it to prove its affirmative defense that the decision would have been the same regardless of the employee's age (or any of the other, statutory, ADEA affirmative defenses). "Doing

so is not unfair to a defendant; on the contrary, it accords the defendant the benefit of an affirmative defense." *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 878 (2d Cir. 1988).

"Direct evidence", it seems, is an unfortunate choice of terminology for the sort of proof needed to establish a "mixed-motives" case. "Direct" and "indirect" describe not the quality of the evidence presented, but the manner in which the plaintiff proves his case. Strictly speaking, the only "direct evidence" that a decision was made "because of" an impermissible factor would be an admission by the decisionmaker such as "I fired him because he was too old." Even a highly-probative statement like "You're fired, old man" still requires the factfinder to draw the inference that the plaintiff's age had a causal relationship to the decision. But juries have always been allowed to draw such inferences.

In contrast, *McDonnell Douglas-Burdine* ("pretext") analysis allows a plaintiff, a member of a protected class, who only suspects that the adverse employment consequences were caused by discrimination, to get into court by showing "that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). Once that is done, the employer must merely articulate a non-discriminatory reason so that the plaintiff can focus his or her proof of the ultimate fact on the employer's alleged reason for dismissal. *Aikens*, 460 U.S. at 716; *Burdine*, 450 U.S. at 255. At this point under the *McDonnell Douglas-Burdine* framework, the plaintiff may prevail in either of two ways: directly, "by persuading the court that a discrimi-

natory reason more likely motivated the employer", or indirectly, "by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256; *see also McDonnell Douglas*, 411 U.S. at 804-05.

Significantly for our purposes, the direct method of proof contemplated by the last step of *Burdine* is the same as the plaintiff's initial burden under *Price Waterhouse*; the only difference is that under *Price Waterhouse*, the plaintiff begins by focusing on the alleged discrimination itself, while the *McDonnell Douglas-Burdine* plaintiff starts by focusing on his own qualifications and the employer's needs. When the more focused proof of discrimination is presented, the court need not go through the *McDonnell Douglas* analysis.

More recently, in reviewing a NLRB decision, we noted that "it is possible to analyze all motivation cases * * * using only the dual motivation approach." *Holo-Krome*, slip op. at 1144. We noted there that the mixed-motives framework

> does not pause to require the employer only to articulate a valid motivation and then place on the [plaintiff] the burden of proving that the articulated explanation is a pretext. This approach differs from motivation inquiry in pretext cases. In that context, the plaintiff starts with the obligation only to present facts raising an inference of unlawful motivation and, if a valid reason is articulated by the defendant, must prove that the unlawful reason was at least part of the motivation. With dual motivation analysis, the defendant need do nothing until the plaintiff has proved unlawful motivation, and then has the burden of proving its affirmative defense.

Holo-Krome, slip op. at 1144-45.

4. Applying the legal standards. Again, the ultimate question we ask in an ADEA case is: Was the plaintiff's employment status adversely affected "because of" his age? 29 U.S.C. § 623(a)(1). Under New York's Human Rights Law the ultimate question is the same. *See* N.Y. Exec. Law § 296(1)(a).

In addition to the portion of the jury charge quoted above, Judge Curtin further instructed the jury:

> In deciding whether or not Bethlehem intentionally discriminated against the plaintiff because of his age, you should consider whether plaintiff established the following facts: 1, whether he was satisfactorily performing his job; 2, that he was permanently laid off and the company refused to transfer him; 3, that the termination or denial of transfer occurred under circumstances giving rise to an inference that age was a motivating factor in the decision. I told you before that plaintiff is not required to prove that age was the sole or exclusive motivation for defendant's termination decision. If you find that age was one of the reasons that prompted the defendant to take that action, then you will consider the defendant's defenses as to which the defendant bears the burden of proof by a preponderance of the evidence.

Judge Curtin initially told the jury that Tyler had to prove that age was a "motivating factor" in Bethlehem's decision. If Tyler failed in this task, the jury was required to return a verdict for Bethlehem. In the event that Tyler proved that age was a motivating factor in Bethlehem's decision to terminate or refuse to transfer him, the jury was instructed to turn to Bethlehem's affirmative defenses, including "that it would have taken the same action regardless of plaintiff's age."

In light of our above discussion, the jury was charged consistently with *Price Waterhouse*, the ADEA, and the Human Rights Law. Tyler was held to the burden of proving, to the jury's satisfation, that the adverse employment consequences were motivated, at least in part, by Tyler's age. The fact that Judge Curtin allowed the jury to draw "an inference that age was a motivating factor in the decision" does not create reversible error, since we have concluded above that a jury may reach its ultimate conclusion on the issue of discrimination through "direct" or "circumstantial" evidence.

Given the general verdict for Tyler on liability, the jury necessarily found that age was a motivating factor in Bethlehem's decision to fire Tyler and not transfer him. Similarly, the jury necessarily rejected Bethlehem's affirmative defense that tightening economic conditions would have compelled the same decision. These conclusions are amply supported by the evidence. Bethlehem's own witness, Daniel Land, testified that Bethlehem's sales force was getting too old; Tyler's layoff helped decrease the average age of Bethlehem's sales force. The internal memorandum recommending Tyler's layoff listed his age and years of service. The position which Tyler was filling in Pittsburgh, on a part-time basis, was left unfilled until Bethlehem could place the 26-year-old Moules in it. The performance appraisals of the Bethlehem employees who *were* allowed to transfer indicate not only that they were all younger than Tyler, but also that Bethlehem had a special category of employees known as "Young Tigers"—an evaluative category from which a long-in-the-tooth employee like Tyler was by definition excluded.

This is not the stuff of a *McDonnell Douglas-Burdine* prima facie case. Tyler proved much more than mere qualification for and availability of the position; he proved, to

the jury's apparent satisfaction, that age actually entered into Bethlehem's decisional processes. Tyler's proof consisted of more than "stray remarks", "statements by non-decisionmakers", and evidence "unrelated to the decisional process". *Compare Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring). If there is no "smoking gun" in Tyler's case, *cf. Lockhart*, 879 F.2d at 48, there is at the very least a thick cloud of smoke, which is certainly enough to require Bethlehem to "convince the factfinder that, despite the smoke, there is no fire." *Price Waterhouse*, 490 U.S. at 266 (O'Connor, J., concurring).

To summarize and to repeat: *Price Waterhouse* does not require, in a jury trial, "direct evidence" of discriminatory animus (at least not in the sense of "direct" and "circumstantial" evidence). What *is* required is simply that the plaintiff submit enough evidence that, if believed, could reasonably allow a jury to conclude that the adverse employment consequences were "because of" an impermissible factor. Since the goal of a New York Human Rights Law (or an ADEA, or a title VII) claim is to determine whether an adverse employment decision was made "because of" an illegitimate factor, an instruction which allows the jury to determine (1) whether an illegitimate criterion was a substantial or motivating factor in an adverse employment decision, and (2) if so, whether the employer has met its burden of proving that the employment decision would have happened anyway, properly captures the import of the Human Rights Law (or ADEA, or title VII).

This is the best way to charge a jury when the ultimate issue is intentional discrimination; anything more complex would mire the court in the hopeless task of distinguishing "direct" from "circumstantial" evidence in addition to the already-complex task of determining dis-

crimination. *See Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1138 (4th Cir. 1988). The jury here was properly instructed.

B. *Weight of the Evidence*

Bethlehem next argues that the jury's verdict was against the "clear weight" of the evidence, and the judgment should simply be reversed. Unlike some state courts, we cannot review jury verdicts on this ground. We will, however, interpret this argument as a challenge to the sufficiency of the evidence, presented here by Judge Curtin's refusal to grant judgment n.o.v., *see* Fed. R. Civ. P. 50(b), and we reject it.

In reviewing the denial of a judgment n.o.v., our function is "essentially the same as the function of the trial court". *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 951-52 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982). To reverse, we must be satisfied, without the benefit of credibility findings, that the evidence is so one-sided and contrary to the jury's verdict that there is only one reasonable conclusion as to the proper judgment. *Id.* at 952.

Bethlehem cites us to *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991), a sixth circuit case affirming a directed verdict for the defense in an ADEA case. Even were we bound by *Wilson*, this case is readily distinguished. In *Wilson*, the plaintiff's evidence consisted of the following: (1) a memo written by a Firestone vice-president at the time of Wilson's severance which made reference to "33 years of service"; (2) a 1986 conversation in which the plaintiff's supervisor expressed a general hope that older employees would take advantage of Firestone's early retirement program; and (3) personnel documents which indicated Wilson's (and other employ-

ees') ages and length of service (and which were required to contain this information under EEOC regulations). *Id.* at 514. These facts are, to be sure, similar to our case, but in *Wilson* that is all there was; here, as our discussion, *supra*, regarding the jury instruction makes clear, much more was offered on Tyler's behalf, and if believed, it could reasonably lead to the conclusion that, because of his age, Tyler was discharged rather than transferred. We therefore affirm Judge Curtin's denial of judgment n.o.v.

C. *Damages*

Bethlehem's third claim is that the $995,000 in damages was "unduly speculative, against the clear weight of the evidence, and based on speculative testimony of plaintiff's expert which should not have gone to the jury." Again, Bethlehem seems to have forgotten that a federal appellate court cannot reweigh the evidence after a trial. Again, we will reconstrue Bethlehem's argument into one cognizable by this federal court.

We see Bethlehem's challenge as two-pronged; *i.e.*, to Judge Curtin's refusal to strike the testimony of Tyler's expert economist, and to the amount of damages. Neither challenge is persuasive.

1. Expert Opinion. Dr. James Holmes, an economist called by Tyler, testified on the amount of economic loss suffered by Tyler as a result of his termination. Bethlehem claims this testimony should have been excluded, stating that Holmes relied on two unfounded assumptions: (1) that Tyler would have continued working for Bethlehem for 17 years; and (2) that Tyler would have received annual salary increases of 8.3% had he continued working for Bethlehem.

Bethlehem's arguments are better addressed to a jury. Holmes derived the 17 year figure from an official government document, *Work Life Estimates, Effects of Race and Education*, published by the U.S. Department of Labor. Applying its data as to average work-life expectancies to Tyler, Holmes concluded that Tyler would have worked until the middle of his sixty-fifth year, or 17 years after his layoff. To determine how much Tyler would have earned during those 17 years, Holmes calculated the rate of increase in Tyler's wages over the past 17 years at an average of 8.3% per year. Holmes then projected the same 8.3% average increase to Tyler's hypothetical earnings for the 17 years from 1985 to 2002 and concluded that Tyler's maximum future lost earnings, discounted to present value, would be $915,105. The jury's award of $667,000 in future lost earnings fell well within this projection.

In support of its motion to strike Holmes' testimony, Bethlehem argued (1) that from 1986 to 1990, "virtually no Bethlehem salesman received a wage increase every year", (2) that the company's overall budget for wage increases ranged from a low of 2-1/2% (1986-88) to a high of 5% (1989-90), and (3) that although "the highest paid Bethlehem salesman in Mr. Tyler's position at the time of trial was earning slightly in excess of $56,000", Holmes had projected Tyler's 1990 salary as $71,688.

Bethlehem's arguments do not address the admissibility of Holmes' testimony. Under Fed. R. Evid. 702, expert testimony is admissible if the witness is qualified as an expert by knowledge, skill, experience, training or education, and if the testimony will be helpful to the trier of fact. Under Fed. R. Evid. 703, expert testimony may be based on firsthand observation of the witness, on facts or data presented at the trial, or on facts and data presented before the trial. All of Bethlehem's arguments, however,

go to the weight, not the admissibility, of the testimony. Judge Curtin did not abuse his discretion when he denied Bethlehem's motion to strike Holmes' testimony.

On this record it was for the jury to determine both the length of the work period denied to Tyler and the amount he would have earned during that period. As to the salary level and the rate of increases the jury could reasonably evaluate the proper weight to give to historical rates, Tyler's own abilities, and the actual wage differences at the company between Tyler's discharge and the time of trial. We cannot say that an award of $667,000 against a maximum projection, discounted to present value, of $915,105, was arbitrary, unreasonable, or speculative.

Moreover, as to Bethlehem's evidence that the highest-paid Bethlehem salesman in 1990 made $56,000, it bears noting that a company which was purging its older, more experienced workers and replacing them with "young tigers" would naturally have a less-senior workforce with a lower average salary. Rather than requiring a new trial, this evidence may have helped to persuade the jury that Bethlehem was in fact purging its older, more experienced, and higher-paid salesmen—like Alvin Tyler.

2. Speculative Damages. Relying on our decision in *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984), an ADEA case, Bethlehem argues that front pay awards for time periods longer than four years "necessarily involve speculation" and cannot be sustained on appeal. We disagree.

Whittlesey held that the enforcement provision of the ADEA, *see* 29 U.S.C. § 626(b), authorizes the district courts to grant an ADEA claimant "such legal or equitable relief as may be appropriate to effectuate the purposes of" the ADEA, a construct which includes front pay. *Whit-*

tlesey, 742 F.2d at 727 (quoting 29 U.S.C. § 626(b)). Similarly, under New York's Human Rights Law, plaintiffs "have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate". N.Y. Exec. Law § 297(9) (McKinney Supp. 1992).

In *Whittlesey*, we held that the district court did not abuse its discretion in ordering front pay for a four-year period between the trial date and the date when compulsory retirement could be imposed. We there affirmed the front pay award because it "did not require undue speculation, either as to the possibility of mitigation, or as to the amount he would have made at Union Carbide had he not been fired." *Id.* at 729.

Although front pay awards always involve some degree of speculation, we think that the jury's deliberations were well-cabined by the expert testimony of expected income, possible future earnings from other employment, and expected worklife. Here, the jury awarded Tyler, discounted to present value, $667,000 in front pay over a work life estimated by Dr. Holmes to be 17 years. This works out to an average of $39,235.29 per year. The undisputed evidence shows that Tyler made more than this amount in each year from 1980 to 1985, and his 1986 income, projected to a full year, would have been substantially higher as well. Such an award cannot possibly shock our conscience. This lower award may well be because of the expert's refreshing forthrightness: on *direct* examination, he specifically allowed for the possibility that Tyler would become employed again. In essence, he told the jury that if they believed Tyler would become employed the day after the trial, the expert's front pay estimate would drop to $327,210. In view of the fact that all money damage awards under New York's Human

Rights Law are legal remedies, *compare Murphy v. American Home Prods. Corp.*, 136 A.D.2d 229, 231, 527 N.Y.S.2d 1, 2 (1st Dep't 1988) *with Whittlesey*, 742 F.2d at 728 (front pay under the ADEA is equitable relief), it was entirely proper for the jury—armed with extensive testimony about future earnings and chances of employment in the steel industry—to arrive at the damage award that it did.

We have reviewed and upheld this verdict under the traditional "shocks the conscience" standard that applies under federal law; however, there is a suggestion that our review should be circumscribed by the "deviates materially from what would be reasonable compensation" standard of N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1992), which gives New York's appellate division somewhat greater latitude in reviewing the rationality of jury verdicts. *See* N.Y. Civ. Prac. L. & R. § 5501 (commentary by David D. Siegel) (McKinney Supp. 1992). This section by its very terms seems to apply *only* to the appellate division, but just as we did in *Gardner v. Federated Dep't Stores*, 907 F.2d 1348, 1353 n.1 (2d Cir. 1990), "we conclude that in the instant case the outcome would be the same under section 5501(c), [so] we need not express an opinion as to which standard applies"; we leave this interesting *Erie* question for still another day.

Bethlehem also challenges the jury's awards of back pay and damages for emotional distress. While the jury's award of $310,000 in back pay was slightly higher than the plaintiff's expert's calculation of $266,106, it does not shock the conscience, nor does it deviate substantially from what would be reasonable compensation; thus, there is no basis for us to disturb that award.

Similarly, the $18,000 awarded for emotional distress was extremely modest; it is neither conscience-shocking nor substantially deviant from reasonable compensation. Tyler testified that losing his job was "like a divorce, your wife died or state of shock." *Compare State Div. of Human Rights v. County of Onondaga Sheriff's Dep't*, 127 A.D.2d 986, 986-87, 513 N.Y.S.2d 68, 68 (4th Dep't 1987) (in a case under § 296(1)(a) of the Human Rights Law, mental anguish award reduced to $15,000 in 1987 dollars where complainant was "upset, depressed, felt demeaned and insecure and still experiences nightmares"), *aff'd without consideration of this point*, 71 N.Y.2d 623, 528 N.Y.S.2d 802, 524 N.E.2d 123 (1988).

D. *Front Pay*

Bethlehem claims that the issue of front pay should not have been submitted to the jury, but should have been decided by the court. Although we have noted, *supra*, that money damages under the Human Rights Law are a legal remedy, we need not reach this issue since Judge Curtin, in deciding both parties' post-trial motions, stated: "If frontpay should be decided by the court, I will consider the jury's verdict as an advisory one and adopt the jury's verdict on frontpay as the court's." Since Judge Curtin unequivocally indicated that he would make the same front pay award himself, it is clear that the alleged error, if any, "does not affect the substantial rights of the parties", Fed. R. Civ. P. 61, and would be harmless.

E. *Punitive Damages*

On his cross-appeal, Tyler challenges Judge Curtin's refusal to send his punitive damages claim to the jury. Citing *Thoreson v. Penthouse International, Ltd.*, 149 Misc.2d 150, 563 N.Y.S.2d 968 (Sup. Ct., N.Y. Cty.

1990), and *Seitzman v. Hudson River Associates*, 143 Misc.2d 1068, 542 N.Y.S.2d 104 (Sup. Ct., N.Y. Cty. 1989), Tyler argues that the New York courts have concluded that punitive damages are recoverable in an action commenced under § 297(9) of New York's Human Rights Law.

Our task is to determine what the pertinent New York law is and how to apply it to this case. Obviously, "the State's highest court is the best authority on its own law", *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967), but we are without guidance from the New York Court of Appeals. We do not even have the benefit of an appellate division decision. The guidance we do have consists of two state trial court opinions (one of which, *Thoreson*, is *sub judice* in New York's appellate division). We are certainly not bound by these two rulings; we need only give them their "proper regard". *Estate of Bosch*, 387 U.S. at 464-65.

In the absence of any New York appellate decision construing § 297(9) in the context of punitive damages, it is entirely proper for us to exercise our own judgment in construing it. 1A James William Moore, *Moore's Federal Practice* ¶ 0.307[2], at 3066-67 (2d ed. 1991). In so doing, we conclude that the New York Court of Appeals, if faced with the question, would conclude that punitive damages are not available. In reaching this conclusion, we are informed by the excellent analysis of Judge Goettel in *Conan v. Equitable Capital Mgmt. Corp.*, 774 F. Supp. 209 (S.D.N.Y. 1991):

> New York's Human Rights Law was amended in 1968 to create a private cause of action. In a statement of their intent, the drafters of the amendment emphasized that the individual subjected to a dis-

criminatory practice should have a right to go to court seeking damages *caused* by discriminatory practices or other appropriate relief. Governor's Committee, *Report to Governor Nelson A. Rockefeller*, at 41 (1968) (emphasis added). Punitive damages, however, are designed to deter conduct and not to award damages for injuries caused by the conduct. It follows, therefore, that punitive damage awards were not contemplated by the New York legislature.

This construction is buttressed by the fact that in 1982 the New York State Assembly Committee on Human Rights recommended that the state court should be empowered to award exemplary damages in human rights cases. *In Pursuit of Justice*, Report of the N.Y. State Assembly Subcommittee on Human Rights, at 10 (March 25, 1982). This report referred to a pending bill which would have enacted such a change. However, that bill was never adopted. This confirms that the Legislature did not consider punitive damages to be available under the Human Rights Law.

An additional consideration is the fact that the New York procedures were originally geared toward encouraging administrative action. Since it is clear that punitive damages can not be obtained administratively, *see Cullen v. Nassau County Civil Service Commission*, 53 N.Y.2d 492, 442 N.Y.S.2d 470, 425 N.E.2d 858 (1981), the effect of allowing such an award in court would be to discourage the very type of administrative procedures that the New York State Legislature sought to encourage.

A corollary consideration is the fact that punitive damages are not available under the equivalent fed-

> eral statutes, namely, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, or the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* The federal courts are already confronted with pendent state claims in many employment discrimination cases because the state statutes already permit a broader range of damages than are available under the federal statutes. If we add punitive damages to that list under state law, the incentive for adding pendent state claims is greatly increased. In addition, recourse to the federal statutes will become highly unattractive except as a device to create federal jurisdiction.

Conan, 774 F. Supp. at 211. We see nothing to add to Judge Goettel's pellucid reasoning and adopt it as our own. In sum, Judge Curtin properly refused to permit the jury to consider punitive damages.

CONCLUSION

The judgment of the district court is affirmed.

Library References

Civil Rights 9.15.
C.J.S. Civil Rights §§60, 66.

§623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

[10] **(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.**

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Entitlement to coverage under group health plan

(1) For purposes of this section, any employer must provide that any employee aged 65 through 69, and any employee's spouse aged 65 through 69, shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee, and the spouse of such employee, under age 65.

(2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of Title 26.

(g)[1] Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

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[1] So in original. Two subsecs. (g) have been enacted.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

[11] (3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

(Pub.L. 90-202, §4, Dec. 15, 1967, 81 Stat. 603; Pub.L. 95-256, §2(a), Apr. 6, 1978, 92 Stat. 189; Pub.L. 97-248, Title I, §116(a), Sept. 3, 1982, 96 Stat. 353; Pub.L. 98-369, Title III, §2301(b), July 18, 1984, 98 Stat. 1063, Pub.L. 98-459, Title VIII, §802(b), Oct. 9, 1984, 98 Stat. 1792.)

Historical Note

1984 Amendments. Subsec. (f)(1). Pub.L. 98-459, §802(b)(1), added provision that it shall not be unlawful for an employment agency, an employer, or labor organization to take any action otherwise prohibited under subsecs. (a) to (e) of this section where such practices involve an employee in a workplace in a foreign country, and compliance with those subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.

Subsec. (g). Pub.L. 98-459, §802(b)(2), added subsec. (g), which relates to employers doing business in foreign countries.

Pub.L. 98-369, §2301(b)(1), inserted in par. (1) of subsec. (g) relating to entitlement to coverage under group health plans, ", and any employee's spouse aged 65 through 69," following "aged 65 through 69".

Pub.L. 98-369, §2301(b)(2), inserted ", and the spouse of such employee," following "as any employee".

1982 Amendment. Subsec. (g). Pub.L. 97-248 added subsec. (g), which related to entitlement to coverage under group health plans.

1978 Amendment. Subsec. (f)(2). Pub.L. 95-256 provided that no seniority system or employee benefit plan require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of the individual.

Effective Date of 1984 Amendments. Amendment by Pub.L. 98-459 effective Oct. 9, 1984, see section 803(a) of Pub.L. 98-459, set out as a note under section 3001 of Title 42, The Public Health and Welfare.

Section 2301(c)(2) of Pub.L. 98-369 provided that: "The amendment made by subsection (b) [amending subsec. (g)(1) of this section] shall become effective on January 1, 1985."

Effective Date of 1982 Amendment. Section 116(c) of Pub.L. 97-248 provided that: "The amendment made by subsection (a) [enacting subsec. (g) of this section] shall become effective on January 1, 1983, and the amendment made by subsection (b) [enacting section 1395y (b)(3) of Title 42, The Public Health and Welfare] shall apply with respect to items and services furnished on or after such date."

Effective Date of 1978 Amendment. Section 2(b) of Pub.L. 95-256 provided that: "The amendment made by subsection (a) of this section [amending subsec. (f)(2) of this section] shall take effect on the date of enactment of this Act [Apr. 6, 1978], except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938 [section 206(d)(4) of this title]), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act [amending section 631 of this title], the amendment made by subsection (a) of this section [amending subsec. (f)(2) of this section] shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first."

Transfer of Functions. All functions vested by this section in the Secretary of Labor or the Civil Service Commission were transferred to the Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, §2, 43 F.R. 19807, 92 Stat. 3781, set out in Appendix 1 to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1-101 of Ex.Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

[4] §623. Prohibition of age discrimination

[*See main volume for text of (a) to (e)*]

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

[*See main volume for text of (1)*]

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

(B) to observe the terms of a bona fide employee benefit plan—

[5] (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter, or

[*See main volume for text of (3)*]

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

(i) Employee pension benefit plan; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance, highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof

to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

[6] (B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section

1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2) of title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(j) Firefighters and law enforcement officers attaining hiring or retiring age under State or local law on March 3, 1983

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a

State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Date of adoption of system or plan

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Minimum age requirements; early retirement benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

[7] (1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraphs (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. [8] The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

[44]§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigation, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action

brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary [45] compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter. *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

[41] §626. Recordkeeping, investigation, and enforcement

[*See main volume for text of (a) to (d)*]

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action upon receipt of notice

Section 259 of this title shall apply to actions under this chapter.

If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(F) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

> **(A)** the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> **(B)** the waiver specifically refers to rights or claims arising under this chapter;
>
> **(C)** the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the [42] agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

[320] 42 U.S.C. §2000e-5

§2000e-5. Enforcement provisions

Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such em-[321] ployer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the

"respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determinations on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been com-[322] menced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice

alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of ref-[323] erence under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c)

or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is

necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief [324] pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a

judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for [325] the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Provisions of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

Proceedings by Commission to compel compliance with judicial orders

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

Appeals

(j) any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

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Attorney's fee; liability of Commission and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Pub.L. 88-352, Title VII, §706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, §4, Mar. 24, 1972, 86 Stat. 104.

[160] **§2000e-5. Enforcement provisions**

[*See main volume for text of (a) to (d)*]

(e) Time for filing of charges; notice; time unlawful practice with respect to seniority system occurs

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State

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or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

[*See main volume for text of (f)*]

(g) Relief available

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

[*See main volume for text of (h) to (j)*]

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a [161] reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

ARTICLE 15—HUMAN RIGHTS LAW

Sec.

290. Purposes of article.
291. Equality of opportunity a civil right.
292. Definitions.
293. Division of human rights.
293-a. Repealed.
294. General policies of division.
295. General powers and duties of division.
296. Unlawful discriminatory practices.
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297. Procedure.
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298. Judicial review and enforcement.
298-a. Application of article to certain acts committed outside the state of New York.
299. Penal provision.
300. Construction.
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§ 290. Purposes of article

1. This article shall be known as the "Human Rights Law".

2. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights.[1]

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[1] See Const. Art. 1, §11.

3. The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants [475] but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the State; to encourage and promote the development and execution by all persons within the state of such state programs; to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions, in public services, in housing accommodations, in commercial space and in credit transactions and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

[478] **§291. Equality of opportunity a civil right**

1. The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sex or marital status is hereby recognized as and declared to be a civil right.

2. The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and

commercial space without discrimination because of age, race, creed, color, national origin, sex or marital status, as specified in section two hundred ninety-six of this article, is hereby recognized as and declared to be a civil right.

3. The opportunity to obtain medical treatment of an infant prematurely born alive in the course of an abortion shall be the same as the rights of an infant born spontaneously.

[479] §292. **Definitions**

When used in this article:

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

2. The term "employment agency" includes any person undertaking to procure employees or opportunities to work.

3. The term "labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.

4. The term "unlawful discriminatory practice" includes only those practices specified in sections two hundred ninety-six and two hundred ninety-six-a of this article.

5. The term "employer" does not include any employer with fewer than four persons in his employ.

6. The term "employee" in this article do[1] not include any individual employed by his parents, spouse or child, or in the domestic service of any person.

7. The term "commissioner" unless a different meaning clearly appears from the context, means the state commissioner of human rights; and the term "division" means the state division of human rights created by this article.

8. The term "national origin" shall, for the purposes of this article, include "ancestry."

9. The term "place of public accommodation, resort or amusement" shall include, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, [480] airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public

[1] So in original. Probably should read "does".

conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants. Such term shall not include public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such public library, kindergarten, primary and secondary school, academy, college, university, professional school, extension course or other education facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which is in its nature distinctly private.

No institution, club, organization or place of accommodation which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements shall be deemed a private exhibition within the meaning of this section.

10. The term "housing accommodation" includes any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings.

11. The term "publicly-assisted housing accommodations" shall include all housing accommodations within the state of New York in

(a) public housing,

(b) housing operated by housing companies under the supervision of the commissioner of housing,

(c) housing constructed after July first, nineteen hundred fifty, within the state of New York

(1) which is exempt in whole or in part from taxes levied by the state or any of its political subdivisions,

(2) which is constructed on land sold below cost by the state or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred forty-nine,

[481] (3) which is constructed in whole or in part on property acquired or assembled by the state or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction, or

(4) for the acquisition, construction, repair or maintenance of which the state or any of its political subdivisions or any agency thereof supplies funds or other financial assistance.

(d) housing which is located in a multiple dwelling, the acquisition, construction, rehabilitation, repair or maintenance of which is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; and

(e) housing which is offered for sale by a person who owns or otherwise controls the sale of ten or more housing accommodations located on land that is

contiguous (exclusive of public streets), if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government of any agency thereof, or the state of any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance, or (2) a commitment, issued by a government agency after July first, nineteen hundred fifty-five, is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof.

12. The term "multiple dwelling", as herein used, means a dwelling which is occupied, as a rule, for permanent residence purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A "multiple dwelling" shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fireproof building used wholly for [482] commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term "family," as used herein, means either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together

and maintaining a common household, with not more than four boarders, roomers or lodgers. A "boarder," "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.

13. The term "commercial space" means any space in a building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property; and any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building, structure or portion thereof.

14. The term "real estate broker" means any person, firm or corporation who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates, or offers or attempts to negotiate, a loan secured or to be secured by a mortgage or other incumbrance upon or transfer of real estate. In the sale of lots pursuant to the provisions of article nine-a of the real property law, the term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell

such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.

15. The term "real estate salesman" means a person employed by a licensed real estate broker to list for sale, sell or offer for sale at auction or otherwise, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate, or to [483] negotiate a loan on real estate, or to lease or rent or offer to lease, rent or place for rent any real estate, or who collects or offers or attempts to collect rent for the use of real estate for or in behalf of such real estate broker.

16. The term "necessary party" means any person who has such an interest in the subject matter of a proceeding under this article, or whose rights are so involved, that no complete and effective disposition can be made without his participation in the proceeding;

17. The term "parties to the proceeding" means the complainant, respondent, necessary parties and persons permitted to intervene as parties in a proceeding with respect to a complaint filed under this article;

18. The term "hearing examiner" means an employee of the division who shall be assigned for stated periods to no other work than the conduct of hearings under this article;

19. The term "discrimination" shall include segregation and separation.

20. The term "credit", when used in this article means the right conferred upon a person by a creditor to incur debt and defer its payment, whether or not any interest or finance charge is made for the exercise of this right.

21. The term "disability" means a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to physical, mental or medical conditions which do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought.

22. The term "creditor", when used in this article, means any person or financial institution which does business in this state and which extends credit or arranges for the extension of credit by others. The term creditor includes, but is not limited to, banks and trust companies, private bankers, foreign banking corporations and national banks, savings banks, licensed lenders, savings and loan associations, credit unions, sales finance companies, insurance premium finance agencies, insurers, credit card issuers, mortgage brokers, mortgage companies, mortgage insurance corporations, wholesale and retail merchants and factors.

[484] 23. The term "credit reporting bureau", when used in this article, means any person doing business in this state who regularly makes credit reports, as such term is defined by subdivision e of a section three hundred seventy-one of the general business law.

24. The term "regulated creditor", when used in this article, means any creditor, as herein defined, which has received its charter, license, or organization certificate, as the case may be, from the banking department or which is otherwise subject to the supervision of the banking department.

25. The term "superintendent", when used in this article, means the head of the banking department appointed pursuant to section twelve of the banking law.

[241] §292. **Definitions**

When used in this article:

[*See main volume for text of 1 to 20*]

21. The term "disability" means (a) a physical mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such as impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

[*See main volume for text of 22 to 25*]

26. The term "familial status", when used in this article, means:

(a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or

(b) one or more individuals (who have not attained the age of eighteen years) being domiciled with:

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent.

[488] §293. Division of human rights

1. There is hereby created in the executive department a division of human rights hereinafter in this article called the division. The head of such division shall be a commissioner hereinafter in this article called the commissioner, who shall be appointed by the governor, by and with the advice and consent of the senate and shall hold office at the pleasure of the governor. The commissioner shall be entitled to his expenses actually and necessarily incurred by him in the performance of his duties.

2. The commissioner may establish, consolidate, reorganize or abolish such bureaus and other organizational units within the division as he determines to be necessary for efficient operation.

[489] §294. General policies of division

The division shall formulate policies to effectuate the purposes of this article and may make recommendations to agencies and officers of the state or local subdivisions of government in aid of such policies and purposes.

[490] §295. General powers and duties of division

The division, by and through the commissioner or his duly authorized officer or employee, shall have the following functions, powers and duties:

1. To establish and maintain its principal office, and such other offices within the state as it may deem necessary.

2. To function at any place within the state.

3. To appoint such officers, attorneys, clerks and other employees and agents, consultants and special committees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

4. To obtain upon request and utilize the services of all governmental departments and agencies.

5. To adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article, and the policies and practice of the division in connection therewith.

6. (a) To receive, investigate and pass upon complaints alleging violations of this article.

(b) Upon its own motion, to test and investigate and to make, sign and file complaints alleging violations of this article and to initiate investigations and studies to carry out the purposes of this article.

7. To hold hearings, to provide where appropriate for cross-interrogatories, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the division. The division may make rules as to the issuance of subpoenas which may be issued by the division at any stage of any investigation or proceeding before it.

In any such investigation or hearing, the commissioner, or an officer duly designated by the commissioner to conduct such in-[491] vestigation or hearing, may confer immunity in accordance with the provisions of section 50.20 of the criminal procedure law.

8. To create such advisory councils, local, regional or statewide, as in its judgment will aid in effectuating the purposes of this article and of section eleven of article one of the constitution of this state, and the division may empower them to study the problems of discrimination in all or specific fields of human relationships or in specific instances of discrimination because of age, race, creed, color, national origin, sex, disability or marital status and make recommendations to the division for the development of policies and procedures in general and in specific instances. The advisory councils also shall disseminate information about the division's activities to organizations and individuals in their localities. Such advisory councils shall be composed of representative citizens, serving without pay, but with reimbursement for actual and necessary traveling expenses; and the division may make provision for technical and clerical assistance to such councils and for the expenses of such assistance.

9. To develop human rights plans and policies for the state and assist in their execution and to make investigations and studies appropriate to effectuate this article and to issue such publications and such results of investigations and research as in its judgment will tend to inform persons of the rights assured and remedies provided under this article, to promote good-will and minimize or eliminate discrimination because of age, race, creed, color, national origin, sex, disability or marital status.

10. To render each year to the governor and to the legislature a full written report of all its activities and of its recommendations.

11. To inquire into incidents of and conditions which may lead to tension and conflict among racial, religious and nationality groups and to take such action within the authority granted by law to the division, as may be designed to alleviate such conditions, tension and conflict;

12. To furnish any person with such technical assistance as the division deems appropriate to further compliance with the purposes or provisions of this article;

13. To promote the creation of human rights agencies by counties, cities, villages or towns in circumstances the division deems appropriate.

14. To accept, with the approval of the governor, as agent of the state, any grant, including federal grants, or any gift for any of the purposes of this article. Any moneys so received may [492] be expended by the division to effectuate any purpose of this article, subject to the same limitations as to approval of expenditures and audit as are prescribed for state moneys appropriated for the purposes of this article;

15. To adopt an official seal.

16. To have concurrent jurisdiction with the New York city commission on human rights over the administration and enforcement of title C of chapter one of the administrative code of the city of New York.

[498] §296. **Unlawful discriminatory practices**

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse

to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sex, or disability or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in [499] referring an applicant or applicants to an employer or employers.

(c) For a labor organization, because of the age, race, creed, color, national origin, sex, or disability or marital status of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color or national origin, sex, or disability or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service examinations concerning any of the

aforementioned characteristics for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sex, or disability or marital status.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article.

(f) Nothing in this subdivision shall affect any restrictions upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

1-a. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs:

(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their [500] qualifications, as determined by objective criteria which permit review;

(b) To deny to or withhold from any person because of race, creed, color, national origin, sex, or disability, or marital status, the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, executive training program, or other occupational training or retraining program;

(c) To discriminate against any person in his pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of race, creed, color, national origin, sex, or disability or marital status;

(d) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sex, or disability or marital status, or any intention to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

2. (a) It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sex, or disability or marital status, or that the patronage or custom thereat of any person of or purporting to be of any particular race, creed, color,

national origin, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited.

(b) Nothing in this subdivision shall be construed to prevent the barring of any person, because of the sex of such person, from places of public accommodations, resort or amusement if the division grants an exemption based on bona fide considera-[501] tions of public policy; nor shall this subdivision apply to the rental of rooms in a housing accommodation which restricts such rental to individuals of one sex.

2-a. It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of publicly-assisted housing accommodations or other person having the right of ownership or possession of or the right to rent or lease such accommodations:

(a) To refuse to rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodations because of the race, creed, color, disability, national origin, age, sex or marital status of such person or persons.

(b) To discriminate against any person because of his race, creed, color, disability, national origin, age, sex or marital status in the terms, conditions or privileges of any publicly-assisted housing accommodations or in the furnishing of facilities or services in connection therewith.

(c) To cause to be made any written or oral inquiry or record concerning the race, creed, color, disability, national origin, age, sex or marital status of a person seeking to rent or lease any publicly-assisted housing accommodation.

(d) Nothing in this subdivision shall restrict the consideration of age in the rental of publicly-assisted housing accommodations if the division grants an exemption based on bona fide considerations of public policy for the purpose of providing for the special needs of a particular age group without the intent of prejudicing other age groups.

(e) Nothing in this subdivision shall be deemed to restrict the rental of rooms in school or college dormitorities to individuals of the same sex.

3-a.[1] It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because an individual is between the ages of eighteen and sixty-five, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment.

(b) For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indi-[502] rectly, any limitation, specification or discrimination respecting individuals between the ages of eighteen and sixty-five, or any intent to make any such limitation, specification or discrimination.

(c) For any employer, licensing agency or employment agency to discharge or otherwise discriminate against any person because he has opposed any practices

[1] There is presently no subd. 3.

forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article.

But nothing contained in this subdivision or in subdivision one of this section shall be construed to prevent the termination of the employment of any person who is physically unable to perform his duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of said subdivisions; nor shall anything in said subdivisions be deemed to preclude the varying of insurance coverages according to an employee's age.

The provisions of this subdivision shall not affect any restriction upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

3-b. It shall be an unlawful discriminatory practice for any real estate broker. real estate salesman or employee or agent thereof or any other individual, corporation, partnership or organization for the purpose of inducing a real estate transaction from which any such person or any of its stockholders or members may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin or marital status of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood or area in which the real property is located, including but not limited to the lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other facilities.

4. It shall be an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be nonsectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law to deny the use of its facilities to any person otherwise qualified, by reason of his race, color, religion, disability, national origin, age or marital status.

[503] 5. (a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sex, or disability or marital status of such person or persons.

(2) To discriminate against any person because of his race, creed, color, national origin, sex, or disability or marital status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitiation, specification or discrimination as to race,

creed, color, national origin, sex, or disability or marital status, or any intent to make any such limitation, specification or discrimination.

The provisions of this paragraph (a) shall not apply (1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other, if the owner or members of his family reside in one of such housing accommodations, (2) to the restriction of the rental of all rooms in a housing accommodation to individuals of the same sex or (3) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and he or members of his family reside in such housing accommodation.

(b) It shall be an unlawful discriminatory practice for the owner, lessee, sublessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, land or commercial space:

(1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons such commercial space because of the age of such person or persons; or such land or commercial space because of the race, creed, color, national ori- [504] gin, sex, or disability or marital status of such person or persons.

(2) To discriminate against any person because of his race, creed, color, national origin, sex, or disability or marital status in the terms, conditions or privileges of the sale, rental or lease of any such land or commercial space or because of his age in relation to such commercial space; or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of such land or commercial space which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sex, or disability or marital status, or in relation to commercial space as to age; or any intent to make any such limitation, specification or discrimination.

(c) It shall be an unlawful discriminatory practice for any real estate broker, real estate salesman or employee or agent thereof:

(1) To refuse to sell, rent or lease any housing accommodation, land or commercial space to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space to any person or group of persons because of the race, creed, color, national origin, sex, or disability or marital status of such person or persons, or in relation to commercial space because of the age of such person or persons or to represent that any housing accommodation, land or commercial space is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any housing accomodation, land or commercial space or any facilities of any housing accommodation, land or commercial space from any person or group of persons because of the race, creed, color, national origin, sex, or disability or marital status of such person or persons or in relation to commercial space because of the age of such person or persons.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or [505] lease of any housing accommodation, land or commercial space which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, sex, or disability or marital status, or in relation to commercial space as to age; or any intent to make any such limitation, specification or discrimination.

(d) It shall be an unlawful discriminatory practice of any real estate board, because of the race, creed, color, national origin, age, sex, or disability or marital status of any individual who is otherwise qualified for membership, to exclude or expel such individual from membership, or to discriminate against such individual in the terms, conditions and privileges of membership in such board.

(e) It shall be an unlawful discriminatory practice for the owner, proprietor or managing agent of, or other person having the right to provide care and services in, a private proprietary nursing home, convalescent home, or home for adults, or an intermediate care facility, as defined in section two of the social services law, heretofore constructed, or to be constructed, or any agent or employee thereof, to refuse to provide services and care in such home or facility to any individual or to discriminate against any individual in the terms, conditions, and privileges of such services and care solely because such individual is a blind person. For purposes of this paragraph, a "blind person" shall mean a person

who is registered as a blind person with the commission for the visually handicapped and who meets the definition of a "blind person" pursuant to section three of chapter four hundred fifteen of the laws of nineteen hundred thirteen[2] entitled "An act to establish a state commission for improving the condition of the blind of the state of New York, and making an appropriation therefor".

(f) The provisions of this subdivision, as they relate to age, shall not apply to persons under the age of eighteen years.

6. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.

7. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he has opposed any practices forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article.

[506] 8. It shall be an unlawful discriminatory practice for any party to a conciliation agreement made pursuant to section two hundred ninety-seven of this article to violate the terms of such agreement.

9. (a) It shall be an unlawful discriminatory practice for any fire department or fire company therein, through any member or members thereof, officers, board of fire commissioners or other body or office having power of appointment of volunteer firemen, directly or indirectly, by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or

[2] McKinney's Unconsol. Laws §8704.

otherwise, to deny to any individual membership in any volunteer fire department or fire company therein, or to expel or discriminate against any volunteer member of a fire department or fire company therein, because of the race, creed, color, national origin, sex or marital status of such individual.

(b) Upon a complaint to the division, as provided for under subdivision one of section two hundred ninety-seven of this article, and in the event the commissioner finds that an unlawful discriminatory practice has been engaged in, the board of fire commissioners or other body or office having power of appointment of volunteer firemen shall be served with any order required, under subdivision four of section two hundred ninety-seven of this article, to be served on any or all respondents requiring such respondent or respondents to cease and desist from such unlawful discriminatory practice and to take affirmative action. Such board shall have the duty and power to appoint as a volunteer fireman, notwithstanding any other statute or provision of law or by-law any volunteer fire company, any individual whom the commissioner has determined to be the subject of an unlawful discriminatory practice under this subdivision. Unless such board has been found to have engaged in an unlawful discriminatory practice, service upon such board of such order shall not constitute such board or its members as a respondent nor constitute a finding of an unlawful discriminatory practice against such board or its members.

10. (a) It shall be an unlawful discriminatory practice for any employer to prohibit, prevent or disqualify any person from, or otherwise to discriminate against any person in, obtaining or holding employment,

because of his observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion.

(b) Except as may be required in an emergency or where his personal presence is indispensable to the orderly transaction of [507] business, no person shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

(c) This subdivision shall not be construed to apply to any position dealing with health or safety where the person holding such position must be available for duty whenever needed, or to any position or class of positions the nature and quality of the duties of which are such that the personal presence of the holder of such position is regularly essential on any particular day or days or portion thereof for the normal performance of such duties with respect to any applicant therefor or holder thereof who, as a requirement of his religion, observes such day or days or portion thereof as his sabbath or other holy day. In the case of any employer other than the state, any of its political subdivision or any school district, this subdivision shall not apply where the

uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer. In any proceeding in which the applicability of this subdivision is in issue, the burden of proof shall be upon the employer. If any question shall arise whether a particular position or class of positions is excepted from this subdivision by this paragraph, such question may be referred in writing by any party claimed to be aggrieved, in the case of any position of employment by the state or any of its political subdivisions, except by any school district, to the civil service commission, in the case of any position of employment by any school district, to the commissioner of education, who shall determine such question and in the case of any other employer, a party claiming to be aggrieved may file a complaint with the division pursuant to this article. Any such determination by the civil service commission shall be reviewable in the manner provided by article seventy-eight of the civil practice law and rules and any such determination by the commissioner of education shall be reviewable in the manner [508] and to the same extent as other determinations of the commissioner under section three hundred ten of the education law.

11. Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

12. Notwithstanding the provisions of subdivisions one, one-a and three-a of this section, it shall not be an unlawful discriminatory practice for an employer, employment agency, labor organization or joint labor-management committee to carry out a plan, approved by the division, to increase the employment of members of a minority group (as may be defined pursuant to the regulations of the division) which has a state-wide unemployment rate that is disproportionately high in comparisen with the state-wide unemployment rate of the general population. Any plan approved under this subdivision shall be in writing and the division's approval thereof shall be for a limited period and may be rescinded at any time by the division.

13. It shall be an unlawful discriminatory practice (i) for any person to discriminate against, boycott or blacklist, or to refuse to buy from, sell or trade with, any person, because of the race, creed, color, national origin or sex of such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person wilfully to do any act or refrain from doing any act which enables any such person to take such action. This subdivision shall not apply to:

(a) Boycotts connected with labor disputes; or

(b) Boycotts to protest unlawful discriminatory practices.

14. It shall be an unlawful discriminatory practice for any person engaged in any activity covered by this section to discriminate aginst a blind person or a hearing impaired person who has a hearing impairment manifested by a speech discrimination score of forty percent or less in the better ear with appropriate

correction as certified by a licensed audiologist or otorhinolaryngologist as defined in section seven hundred [509] eighty-one of the general business law, as added by chapter seven hundred ninety-nine of the laws of nineteen hundred seventy-five, or a physician who has examined such person pursuant to the provisions of section seven hundred eighty-four of such law as added by such chapter on the basis of his use of a guide dog or hearing dog.

15. It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based upon his having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-a of the correction law.

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, however, that the provisions hereof shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons.

[247] §296. **Unlawful discriminatory practices**

1. It shall be an unlawful discriminatory practice:

[*See main volume for text of (a) to (f)*]

(g) For an employer to compel an employee who is pregnant to take a leave of absence, unless the employee is prevented by such pregnancy from [248] performing the activities involved in the job or occupation in a reasonable manner.

1-a. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs:

[*See main volume for text of (a)*]

(b) To deny to or withhold from any person because of race, creed, color, national origin, sex age, disability, or marital status, the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, executive training program, or other occupational training or retraining program;

(c) To discriminate against any person in his pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of race, creed, color, national origin, sex, age, disability or marital status;

(d) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color national origin, sex, age disability or marital status, or

any intention to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

[*See main volume for text of 2 to 2-a(c)*]

(d)(1) To refuse to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by the said person, if the modifications may be necessary to afford the said person full enjoyment of the premises, in conformity with the provisions of the New York state uniform fire prevention and building code, except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(2) To refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling or

(3) In connection with the design and construction of covered multi-family dwellings for the first occupancy after March thirteenth, nineteen hundred ninety-one, a failure to design and construct dwellings in accordance with the accessibility requirements of the New York state uniform fire prevention and building code, to provide that:

(i) The public use and common use portions of the dwellings are readily accessible to and usable by disabled persons with disabilities;

(ii) All the doors are designed in accordance with the New York state uniform fire prevention and building code to allow passage into and within all premises and are sufficiently wide to allow passage by persons in wheelchairs; and

(iii) All premises within covered multi-family dwelling units contain an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations; there are reinforcements in the bathroom walls to allow later installation of grab bars; and there are usable kitchens and bathrooms [249] such that an individual in a wheelchair can maneuver about the space, in conformity with the New York state uniform fire prevention and building code.

(e) Nothing in this subdivision shall restrict the consideration of age in the rental of publicly-assisted housing accommodations if the division grants an exemption based on bona fide considerations of public policy for the purpose of providing for the special needs of a particular age group without the intent of prejudicing other age groups.

(f) Nothing in this subdivision shall be deemed to restrict the rental of rooms in school or college dormitories to individuals of the same sex.

3-a.[1] It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, to refuse to hire or employ or license or to bar or to terminate from employment an individual eighteen years of age or older, or to discrimiante against such individual in promotion, compensation or in terms, conditions, or privileges of employment, because of such individual's age.

[1] No subd. 3 has been enacted.

(b) For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment, which expresses, directly or indirectly, any limitation, specification or discrimination on account of age respecting individuals eighteen years of age or older, or any intent to make any such limitation, specification, or discrimination.

(c) For any employer, licensing agency or employment agency to discharge or otherwise discriminate against any person because he has opposed any practices forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article.

(d) Notwithstanding any other provision of law, no employee shall be subject to termination or retirement from employment on the basis of age, except where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business, where the differentiation is based on reasonable factors other than age, or as otherwise specified in paragraphs (e) and (f) of this subdivision or in article fourteen-A of the retirement and social security law.

(e) Nothing contained in this subdivision or in subdivision one of this section shall be construed to prevent the compulsory retirement of any employee who has attained sixty-five years of age, and who, for a two-year period immediately before retirement is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any

combination of such plans, of the employer of such employee, which equals, in the aggregate, at least forty-four thousand dollars; provided that for the purposes of this paragraph only, the term "employer" includes any employer as otherwise defined in this article but does not include (i) the state of New York, (ii) a county, city, town, village or any other political subdivision or civil division of the state, (iii) a school district or any other governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission or public benefit coropration, or (vi) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state. In applying the retirement benefit test of this paragraph, if any such retirement benefit is in a form other than a straight life annuity with no ancillary benefits, or if employees contribute to any such plan or make [250] rollover contributions, such benefit shall be adjusted in accordance with rules and regulations promulgated by the division, after an opportunity for public hearing, so that the benefit is the equivalent of a straight life annuity with no ancillary benefits under a plan to which employees do not contribute and under which no rollover contributions are made.

(f) Nothing contained in this subdivision, in subdivision one of this section or in article fourteen-A of the retirement and social security law shall be construed to prevent the compulsory retirement of any employee who has attained seventy years of age and is serving under a contract for unlimited tenure, or a similar arrangement providing for unlimited tenure, at a nonpublic institution of higher education. For purposes of such subdivisions or article, the term "institution of

higher education" means an educational institution which (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, (2) is lawfully authorized to provide a program of education beyond secondary education, and (3) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree.

(g) In the event of a conflict between the provisions of this subdivision and the provisions of article fourteen-A of the retirement and social security law, the provisions of article fourteen-A of such law shall be controlling.

But nothing contained in this subdivision, in subdivision one of this section or in article fourteen-A of the retirement and social security law shall be construed to prevent the termination of the employment of any person who is physically unable to perform his duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of said subdivisions or said article; nor shall anything in said subdivisions or said article be deemed to preclude the varying of insurance coverages according to any employee's age.

The provisions of this subdivision shall not affect any restriction upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

[*See main volume for text of 3-b and 4*]

5. (a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sex, age, disability, marital status, or familial status of such person or persons.

(2) To discriminate against any person because of race, creed, color, national origin, sex, age, disability, marital status, or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which express, directly or indi-
[251] rectly, any limitation, specification or discrimination as to race, creed, color, national origin, sex, age, disability, marital status, or familial status, or any intent to make any such limitation, specification or discrimination.

The provisions of this paragraph (a) shall not apply (1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other, if the owner or members of the owner's family reside in one of such housing accommodations, (2) to the restriction of the rental of all rooms in a housing accommodation to individuals of the same sex or (3) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner or

members of the owner's family reside in such housing accommodation or (4) solely with respect to age to the restriction of the sale, rental or lease of housing accommodations exclusively to persons fifty-five years of age or older.

(b) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, land or commercial space:

(1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons land or commercial space because of the race, creed, color, national origin, sex, age, or disability or marital status of such person or persons.

(2) To discriminate against any person because of his race, creed, color, national origin, sex, age, or disability or marital status in the terms, conditions or privileges of the sale, rental or lease of any such land or commercial space; or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of such land or commercial space which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sex, age, or disability or marital status; or any intent to make any such limitation, specification or discrimination.

(4) With respect to age, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of land or commercial space exclusively to persons fifty-five years of age or older.

(c) It shall be an unlawful discriminatory practice for any real estate broker, real estate salesman or employee or agent thereof:

(1) To refuse to sell, rent or lease any housing accommodation, land or commercial space to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space to any person or group of persons because of the race, creed, color, national origin, sex, age disability, marital status, or familial status of such person or persons, or to represent that any housing accommodation, land or commercial space is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any housing accommodation, land or commercial space or any facilities of any housing accommodation, land or commercial space from any person or group of persons because of the race, creed, color, national origin, sex, age, disability, marital status, or familial status of such person or persons.

[252] (2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation, land or commercial space which expresses, directly or indirectly, and limitation or specification, or discrimination as to race, creed, color,

national origin, sex, age, disability, marital status, or familial status; or any intent to make any such limitation, specification or discrimination.

(3) With respect to age, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of any housing accommodation, land or commercial space exclusively to persons fifty-five years of age or older.

[*See main volume for text of (d) to (f); 6 to 10*]

11. Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.

[*See main volume for text of 12 and 13*]

14. It shall be an unlawful discriminatory practice for any person engaged in any activity covered by this section to discriminate against a blind person, a hearing impaired person who has a hearing impairment manifested by a speech discrimination score of forty percent or less in the better ear with appropriate correction as certified by a licensed audiologist or otorhinolaryngologist as defined in section seven hundred eighty-one of the general business law, as added by chapter seven hundred ninety-nine of the laws of nineteen hundred seventy-five, or a physician who has examined such person pursuant to the provisions of

section seven hundred eighty-four of such law as added by such chapter or a person with a disability on the basis of his use of a guide dog, hearing dog or service dog.

[*See main volume for text of 15*]

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, however, that the provisions hereof shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law.

[253] 17. Nothing in this section shall prohibit the offer and acceptance of a discount to a person sixty-five years of age or older for housing accommodations.

18. It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right or ownership of or possession of or the right to rent or lease housing accommodations:

(1) To refuse to permit, at the expense of a person with a disability, reasonable modifications of existing premises occupied or to be occupied by the said person, if the modifications may be necessary to afford the said person full enjoyment of the premises, in conformity with the provisions of the New York state uniform fire prevention and building code except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(2) To refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling or

(3) In connection with the design and construction of covered multi-family dwellings for first occupancy after March thirteenth, nineteen hundred ninety-one, a failure to design and construct dwellings in accordance with the accessibility requirements of the New York state uniform fire prevention and building code to provide that:

(i) The public use and common use portions of the dwellings are readily accessible to and usable by persons with disabilities;

(ii) All the doors are designed in accordance with the New York state uniform fire prevention and building code to allow passage into and within all premises and are sufficiently wide to allow passage by persons in wheelchairs; and

(iii) All premises within covered multi-family dwelling units contain an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations; there are reinforcements in the bathroom walls to allow later installation of grab bars; and there are usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space, in conformity with the New York state uniform fire prevention and building code.

19. Nothing in this section shall prohibit the offer and acceptance of a discount for housing accommodations to a person with a disability, as defined in subdivision twenty-one of section two hundred ninety-two of this article.

[549] §296-a. Unlawful discriminatory practices in relation to credit

1. It shall be an unlawful discriminatory practice for any creditor or any officer, agent or employee thereof:

a. In the case of applications for credit with respect to the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space to discriminate against any such applicant because of the race, creed, color, national origin, age, sex, marital status or disability of such applicant or applicants or any member, stockholder, director, officer or employee of such applicant or applicants, or of the prospective occupants or tenants of such housing accommodation, land or commercial space, in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any such credit.

b. To discriminate in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit, on the basis of race, creed, color, national origin, age, sex, marital status or disability.

c. To use any form of application for credit or use or make any record or inquiry which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, age, sex, marital status or disability.

d. To make any inquiry of an applicant concerning his or her capacity to reproduce, or his or her use of advocacy of any form of birth control or family planning.

e. To refuse to consider sources of an applicant's income or to subject an applicant's income to discounting, in whole or in part, because of an applicant's race, creed, color, national origin, age, sex, marital status, childbearing potential or disability.

2. Without limiting the generality of subdivision one, it shall be considered discriminatory if, because of an applicant's or class of applicants' race, creed, color, national origin, age, sex, marital status or disability, (i) an applicant or class of applicants is denied credit in circumstances where other applicants of like overall credit worthiness are granted credit, or (ii) special requirements or conditions, such as requiring co-obligors or reapplication upon marriage, are imposed upon an applicant or class of applicants in circumstances where similar requirements or conditions are not imposed upon other applicants of like overall credit worthiness.

[550] 3. It shall not be considered discriminatory if credit differentiations or decisions are based upon factually supportable, objective differences in applicants'

overall credit worthiness, which may include reference to such factors as current income, assets and prior credit history of such applicants, as well as reference to any other relevant factually supportable data; provided, however, that no creditor shall consider, in evaluating the credit worthiness of an applicant, aggregate statistics or assumptions relating to race, creed, color, national origin, sex, marital status or disability, or to the likelihood of any group of persons bearing or rearing children, or for that reason receiving diminished or interrupted income in the future.

3-a. It shall not be an unlawful discriminatory practice to consider age in determining credit worthiness when age has a demonstrable and statistically sound relationship to a determination of credit worthiness.

4. a. If so requires by an applicant for credit, a creditor shall furnish such applicant with a statement of the specific reasons for rejection of the applicant's application for credit.

b. If so requested in writing by an individual who is or was married, a creditor or credit reporting bureau shall maintain in its records a separate credit history for any such individual. Such separate history shall include all obligations as to which such bureau has notice with respect to which any such person is or was individually or jointly liable.

5. No provision of this section providing spouses the right to separately apply for credit, borrow money, or have separate credit histories maintained shall limit or foreclose the right of creditors, under any other provision of law, to hold one spouse legally liable for debts incurred by the other.

6. Any person claiming to be aggrieved by an unlawful discriminatory practice engaged in by a regulated creditor, in lieu of the procedure set forth in section two hundred ninety-seven of this chapter, may file a verified complaint with the superintendent, as provided hereinafter; provided however, that the filing of a complaint with either the superintendent or the division shall bar subsequent recourse to the other agency, as well as to any local commission on human rights, with respect to the grievance complained of.

7. In the case of a verified complaint filed with the superintendent the following procedures shall be followed:

a. After receipt of the complaint, the superintendent shall make a determination within thirty days of whether there is [551] probable cause to believe that the person named in the complaint has engaged in or is engaging in an unlawful discriminatory practice. If the superintendent determines there is no such probable cause, the complaint shall be dismissed. If the superintendent determines that there is such probable cause, he shall attempt to resolve such complaint by conference and conciliation. If conciliation is achieved, the terms shall be recorded in a written agreement signed by the creditor and complainant, a copy of which shall be forwarded to the commissioner.

b. If conciliation is not achieved, the superintendent or his designated representative shall conduct a hearing with respect to the alleged violation of this section. All interested parties shall be entitled to adequate and timely notice of the hearing. Such parties shall have the right to be represented by counsel or by other representatives of their own choosing; to offer evidence

and witnesses in their own behalf and to cross-examine other parties and witnesses; to have the power of subpoena exercised in their behalf; and to have access to a written record of such hearing. The superintendent or his representative shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken shall be under oath and a record shall be made of the proceedings. A written decision shall be made by the superintendent or his designated representative separately setting forth findings of fact and conclusions of law. A copy of such decision shall be forwarded to the commissioner.

c. If the superintendent finds that a violation of this section has occurred, the superintendent shall issue an order which shall do one or more of the following:

(1) impose a fine in an amount not to exceed ten thousand dollars for each violation, to be paid to the people of the state of New York;

(2) award compensatory damages to the person aggrieved by such violation;

(3) require the regulated creditor to cease and desist from such unlawful discriminatory practices;

(4) require the regulated creditor to take such further affirmative action as will effectuate the purposes of this section, including, but not limited to, granting the credit which was the subject of the complaint.

d. Any complainant, respondent or other person aggrieved by any order or final determination of the superintendent may obtain judicial review thereof.

[552] 8. Where the superintendent makes a determination that a regulated creditor has engaged in or is engaging in discriminatory practices, the

superintendent is empowered to issue appropriate orders to such creditor pursuant to the banking law. Such orders may be issued without the necessity of a complaint being filed by an aggrieved person.

9. Whenever any creditor makes application to the superintendent or the banking board to take any action requiring consideration by the superintendent or such board of the public interest and the needs and convenience thereof, or requiring a finding that the financial responsibility, experience, charter,[1] and general fitness of the applicant, and of the members thereof if the applicant be a co-partnership or association, and of the officers and directors thereof if the applicant be a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently, such creditor shall certify to the superintendent compliance with the provisions of this section. In the event that the records of the banking department show that such creditor has been found to be in violation of this section, such creditor shall describe what action has been taken with respect to its credit policies and procedures to remedy such violation or violations. The superintendent shall, in approving the foregoing applications and making the foregoing findings, give appropriate weight to compliance with this section.

10. Any complaint filed with the superintendent pursuant to this section shall be so filed within one year after the occurrence of the alleged unlawful discriminatory practice.

11. The superintendent is hereby empowered to promulgate rules and regulations hereunder to effectuate the purposes of this section.

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[1] So in original. Probably should be "character."

12. The provisions of this section, as they relate to age, shall not apply to persons under the age of eighteen years.

[553] §297. **Procedure**

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The industrial commissioner or the attorney-general or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney-general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose em-[554] ployees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

2. After the filing of any complaint, the division shall promptly serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred eighty days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect

to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

3. a. If in the judgment of the division the circumstances so warrant, it may, at any time after the filing of the complaint, endeavor to eliminate such unlawful discriminatory practice by conference, conciliation and persuasion. Each conciliation agreement shall include provisions requiring the respondent to refrain from the commission of unlawful discriminatory practices in the future and may contain such further provisions as may be agreed upon by the division and the respondent, including a provision for the entry in the supreme court in any county in the judicial district where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or where the housing accommodation, land or commercial space specified in the complaint is located, of a consent decree embodying the terms of the conciliation agreement. The division shall not disclose what has transpired in the course of such endeavors.

b. If the respondent and the division agree upon conciliation terms the division shall serve upon the complainant's a copy of the proposed conciliation agreement. If the complainant agrees to the terms of the agreement or fails to object to such terms within fifteen days after its service upon him, the division shall issue an order embodying such conciliation agreement. If the complainant objects to the agreement he shall serve a specification of his objections upon the division within

such period. Unless such objections are met or withdrawn within ten days after service thereof, the division shall notice the complaint for hearing.

[555] c. Notwithstanding any other provisions of this section, the division may, where it finds the terms of a conciliation agreement to be in the public interest, execute such agreement, and limit the hearing to the objections of the complainant. If, however, the division finds that the complainant's objections to the proposed conciliation agreement are without substance or that noticing the complaint for hearing would be otherwise undesirable, the division may in its unreviewable discretion, at any time prior to a hearing before a hearing examiner dismiss the complaint on the grounds of administrative convenience.

d. If a conciliation agreement is entered into, the division shall serve a copy of the order embodying such agreement upon all parties to the proceeding, and if a party to any such proceeding is a regulated creditor, the division shall forward a copy of the order embodying such agreement to the superintendent.

4. a. Within two hundred seventy days after a complaint is filed, or within one hundred twenty days after the board has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the division has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint and appear at a

public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney. No person who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside for good cause shown may appear [556] at such hearing in person or otherwise, with or without counsel, cross examine witnesses and the complainant and submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his answer. The hearing examiner shall not be

bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made.

b. If the respondent fails to answer the complaint, the hearing examiner designated to conduct the hearing may enter the default and the hearing shall proceed on the evidence in support of the complaint. Such default may be set aside only for good cause shown upon equitable terms and conditions.

c. Within one hundred eighty days after the commencement of such hearing, a determination shall be made and an order served as hereinafter provided. If, upon all the evidence at the hearing, the commissioner shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commissioner shall state findings of fact and shall issue and cause to be served on such respondent an order, based on such findings and setting them forth, and including such of the following provisions as in the judgment of the division will effectuate the purposes of this article: (i) requiring such respondent to cease and desist from such unlawful discriminatory practice; (ii) requiring such respondent to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a guidance program, apprenticeship training program, on-the-job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, granting the credit which was the subject of any complaint; (iii) awarding of compensatory damages

to the person aggrieved by such practice; (iv) requiring payment to the state of profits obtained by a respondent through the commission of unlawful discriminatory acts described in subdivision three-b of section two hundred ninety-six [557] of this article; and (v) requiring a report of the manner of compliance. If, upon all the evidence, the commissioner shall find that a respondent has not engaged in any such unlawful discriminatory practice, he shall state findings of fact and shall issue and cause to be served on the complainant an order based on such findings and setting them forth dismissing the said complaint as to such respondent. A copy of each order issued by the commissioner shall be delivered in all cases to the attorney general, the secretary of state, if he has issued a license to the respondent, and such other public officers as the division deems proper, and if any such order issued by the commissioner concerns a regulated creditor, the commissioner shall forward a copy of any such order to the superintendent. A copy of any complaint filed against any respondent who has previously entered into a conciliation agreement pursuant to paragraph a of subdivision three of this section or as to whom an order of the division has previously been entered pursuant to this paragraph shall be delivered to the attorney general, to the secretary of state if he has issued a license to the respondent and to such other public officers as the division deems proper, and if any such respondent is a regulated creditor, the commissioner shall forward a copy of any such complaint to the superintendent.

d. The division shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder.

5. Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.

6. At any time after the filing of a complaint with the division alleging an unlawful discriminatory practice under this article, if the division determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the commissioner may enter in such proceeding, the commissioner may apply to the supreme court in any county where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or if the complaint alleges an unlawful discriminatory practice under subdivision three or paragraphs (a), (b) or (c) of subdivision five of section two hundred ninety-six of this article, where the housing accommodation, land or commercial space specified in the complaint is located, for an order requiring the respondents or any of them to show cause why they should not be enjoined from doing or procuring to be done such act. The order to show cause may contain a temporary re-[558] straining order and shall be served in the manner provided therein. On the return date of the order to show cause, and after affording all parties an opportunity to be heard, if the court deems it necessary to prevent the respondents from rendering ineffectual an order relating to the subject matter of the complaint, it may grant appropriate injunctive relief upon such terms and conditions as it deems proper. In the event that the complaint is dismissed by final order of the division or a court, the respondents shall be entitled to such remedies as are prescribed in section twenty-five hundred twelve of the civil practice law and rules.

7. Not later than one year from the date of a conciliation agreement or an order issued under this section, and at any other times in its discretion, the division shall investigate whether the respondent is complying with the terms of such agreement or order. Upon a finding of non-compliance, the division shall take appropriate action to assure compliance.

8. No officer, agent or employee of the division shall make public with respect to a particular person without his consent information from reports obtained by the division except as necessary to the conduct of a proceeding under this section.

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a.

[281] **§296-a. Unlawful discriminatory practices in relation to credit**

1. It shall be an unlawful discriminatory practice for any creditor or any officer, agent or employee thereof:

[*See main volume for text of a to e*]

f. To discriminate against a married person because such person neither uses nor is known by the surname of his or her spouse.

This paragraph shall not apply to any situation where the use of a surname would constitute or result in a criminal act.

[*See main volume for text of 2 to 12*]

§297. Procedure

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The commissioner of labor or the attorney-general, or the chairman of the commission on quality of care for the mentally disabled, or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney-general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employ- [282] ees, or some of them refuse or threaten to

refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

2. a. After the filing of any complaint, the division shall promptly serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred eighty days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

b. Notwithstanding the provisions of paragraph a of this subdivision, with respect to housing discrimination only, after the filing of any complaint, the division shall, within thirty days after receipt, serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

[*See main volume for text of 3*]

4. a. [Eff. until June 30, 1994.] (i) Within two hundred seventy days after a complaint is filed, or within one hundred twenty days after the court has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the division has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint and appear at a public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney. No person who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside

for good cause shown may appear at such hearing in person or otherwise with or without counsel, cross examine witnesses and the complainant and [283] submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his answer. The hearing examiner shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made.

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, the commissioner of human rights shall establish a voluntary arbitration procedure in cooperation with the New York state human rights arbitration advisory committee. The commissioner shall promulgate rules and regulations to enable complainants and respondents to voluntarily submit disputes to impartial arbitration. The division shall fully notify complainants and respondents eligible to elect arbitration of their rights and responsibilities, including limitations on their right of appeal. All information provided shall be in or be accompanied by an explanation in plain English or other languages as necessary. The arbitration program shall be administered by the American Arbitration Association and the arbitrator shall be selected from the panel of arbitrators established by such association. A submission to arbitration shall divest the commissioner of further jurisdiction over the matter and the

determination of the arbitrator shall be final, subject only to review in accordance with article seventy-five of the civil practice law and rules. The cost of such arbitration shall not be borne by the division but shall be provided for by the rules and regulations of the commissioner. The commissioner is authorized to apply for and receive such grant monies as may be available to support the arbitration program.

[*See main volume for text of b*]

c. Within one hundred eighty days after the commencement of such hearing, a determination shall be made and an order served as hereinafter provided. If, upon all the evidence at the hearing, the commissioner shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commissioner shall state findings of fact and shall issue and cause to be served on such respondent an order, based on such findings and setting them forth, and including such of the following provisions as in the judgment of the division will effectuate the purposes of this article: (i) requiring such respondent to cease and desist from such unlawful discriminatory practice; (ii) requiring such respondent to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a guidance program, apprenticeship training program, on-the-job training program or other occupational training or retaining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, granting the credit which was the subject of any complaint; (iii) awarding of compensatory damages to the

person aggrieved by such practice; (iv) awarding of punitive damages, in cases of housing discrimination only, in an amount not to exceed ten thousand dollars, to the person aggrieved by such practice; (v) requiring payment to the state of profits obtained by a respondent through the commission of unlawful discriminatory acts described in subdivision three-b of section two hundred ninety-six of this article; and (vi) requiring a report of the manner of compliance. If, upon all the evidence, the [284] commissioner shall find that a respondent has not engaged in any such unlawful discriminatory practice, he shall state findings of fact and shall issue and cause to be served on the complainant an order based on such findings and setting them forth dismissing the said complaint as to such respondent. A copy of each order issued by the commissioner shall be delivered in all cases to the attorney general, the secretary of state, if he has issued a license to the respondent, and such other public officers as the division deems proper, and if any such order issued by the commissioner concerns a regulated creditor, the commissioner shall forward a copy of any such order to the superintendent. A copy of any complaint filed against any respondent who has previously entered into a conciliation agreement pursuant to paragraph a of subdivision three of this section or as to whom an order of the division has previously been entered pursuant to this paragraph shall be delivered to the attorney general, to the secretary of state if he has issued a license to the respondent and to such other public officers as the division deems proper, and if any such respondent is a regulated creditor, the commissioner shall forward a copy of any such complaint to the superintendent.

[*See main volume for text of d; 5*]

6. At any time after the filing of a complaint with the division alleging an unlawful discriminatory practice under this article, if the division determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the commissioner may enter in such proceeding, the commissioner may apply to the supreme court in any county where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or if the complaint alleges an unlawful discriminatory practice under subdivision two-a or paragraph (a), (b) or (c) of subdivision five of section two hundred ninety-six of this article, where the housing accommodation, land or commercial space specified in the complaint is located, or, if no supreme court justice is available in such county, in any other county within the judicial district, for an order requiring the respondents or any of them to show cause why they should not be enjoined from doing or procuring to be done such act. The order to show cause may contain a temporary restraining order and shall be served in the manner provided therein. On the return date of the order to show cause, and after affording all parties an opportunity to be heard, if the court deems it necessary to prevent the respondents from rendering ineffectual an order relating to the subject matter of the complaint, it may grant appropriate injunctive relief upon such terms and conditions as it deems proper.

[*See main volume for text of 7 and 8*]

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate,

unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed. A complaint filed by the equal employment opportunity commission to comply with the requirements of 42 USC 2000e-5(c)[1] shall not constitute the filing of a complaint within the meaning of this subdivision. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which [285] would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a.

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[1] 42 U.S.C.A. §2000e-5(c).

[311] §298. **Judicial review and enforcement**

Any complainant, respondent or other person aggrieved by an order of the commissioner which is an order after public hearing, a cease and desist order, an order awarding damages, an order dismissing a complaint, or by an order of the division which makes a final disposition of a complaint may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the court, in a proceeding as [312] provided in this section. Such proceeding shall be brought in th supreme court in the county wherein the unlawful discriminatory practice which is the subject of the order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business. Such proceeding shall be initiated by the filing of a notice of petition and petition in such court. Thereafter, at a time and in a manner to be specified by rules of court, the division shall file with the court a written transcript of the record of all prior proceedings. Upon the filing of a notice of petition and petition, the court shall have jurisdiction of the proceeding and of the questions determined therein, except that where the order sought to be reviewed as made as a result of a public hearing held pursuant to paragraph a of subdivision four of section two hundred ninety-seven of this article, the court shall make an order directing that the proceeding be transferred for disposition to the appellate division of the supreme court in the judicial department embracing the county in which the proceeding was commenced. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon

the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part such order. No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he shows reasonable grounds for the failure to adduce such evidence in prior proceedings. The findings of facts on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole. All such proceedings shall be heard and determined by the court and any appeal taken from its judgment or order shall be reviewed by the appropriate appellate court as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the courts over these proceedings, as provided for herein, shall be exclusive and their judgments and orders shall be final, subject to appellate review in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding. The division's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of such order. Any appeal under this section and any proceeding, if instituted under article seventy-eight of the civil practice law and rules to which the division or the board is a party shall be heard on the record without requirement of printing. The division may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within sixty days after the service of such order.

[642] §298-a. Application of article to certain acts committed outside the state of New York

1. The provisions of this article shall apply as hereinafter provided to an act committed outside this state against a resident of this state or against a corporation organized under the laws of this state or authorized to do business in this state, if such act would constitute an unlawful discriminatory practice if committed within this state.

2. If a resident person or domestic corporation violates any provision of this article by virtue of the provisions of this section, this article shall apply to such person or corporation in the same manner and to the same extent as such provisions would have applied had such act been committed within this state except that the penal provisions of such article shall not be applicable.

3. If a non-resident person or foreign corporation violates any provision of this article by virtue of the provisions of this section, such person or corporation shall be prohibited from transacting any business within this state. Except as otherwise provided in this subdivision, the provisions of section two hundred ninety-seven of this chapter governing the procedure for determining and processing unlawful discriminatory practices shall apply to violations defined by this subdivision insofar as such provisions are or can be made applicable. If the division of human rights has reason to believe that a non-resident person or foreign corporation has committed or is about to commit outside of this state an act which if committed within this state would constitute an unlawful discriminatory practice and that such act is in violation of any provision of this article by

virtue of the provisions of this section, it shall serve a copy of the complaint upon such person or corporation by personal service either within or without the state or by registered mail, return receipt requested, directed to such person or corporation at his or its last known place of residence or business, together with a notice requiring such person or corporation to appear at a hearing, specifying the time and place thereof, and to show cause why a cease and desist order should not be issued against such person or corporation. If such person or corporation shall fail to appear at such hearing or does not show sufficient cause why such order should not be issued, the division shall cause to be issued and served upon such person or corporation an order to cease and desist from the act or acts complained of. Failure to comply with any such order shall be followed by the issuance by the division [643] of an order prohibiting such person or corporation from transacting any business within this state. A person or corporation who or which transacts business in this state in violation of any such order is guilty of a class A misdemeanor. Any order issued pursuant to this subdivision may be vacated by the division upon satisfactory proof of compliance with such order. All orders issued pursuant to this subdivision shall be subject to judicial review in the manner prescribed by article seventy-eight of the civil practice law and rules.

§299. Penal provision

Any person, employer, labor organization or employment agency, who or which shall wilfully resist, prevent, impede or interfere with the division or any of its employees or representatives in the performance of duty under this article, or shall willfully violate an order of the division or commissioner, shall be guilty of a misdemeanor and be punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both; but procedure for the review of the order shall not be deemed to be such wilful conduct.

[644] §300. Construction

The provisions of this article shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination because of race, creed, color or national origin; but as to acts declared unlawful by section two hundred ninety-six of this article, the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall include any other action, civil or criminal, based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure provided in this article, he may not subsequently resort to the procedure herein.

[645] §301. Separability

If any clause, sentence, paragraph or part of this article or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this article.

Supreme Court, U.S.
FILED
JUN 17 1992
OFFICE OF THE CLERK

(2)

No. 91-1975

In The

Supreme Court of the United States

October Term, 1991

BETHLEHEM STEEL CORPORATION,

Petitioner,

vs.

ALVIN JOEL TYLER,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Second Circuit Court of Appeals, applying New York's Human Rights Law, correctly upheld the district court's instruction to the jury to consider Bethlehem's affirmative defense if Alvin Joel Tyler ("Tyler") proved age was a motivating factor in Bethlehem Steel Corporation's ("Bethlehem") decision to terminate him or refuse to transfer him. .

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STATEMENT OF THE CASE

United States Court of Appeals for the Second Circuit, affirming the district court, found:

> "On June 27, 1986, Janes sent a memorandum to W. T. deHaven, district manager of Bethlehem's Pittsburgh sales office, recommending that Bethlehem shut down the Buffalo sales office. He made a number of other recommendations, including 'Lay off A. J. Tyler (Age 48, twenty-six years service)'. Sawyer testified that age and years of service were factors relevant to Bethlehem's pensions, savings plans, and insurance levels." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1178 (2d Cir. 1992).

Edwin W. Janes ("Janes"), Tyler's supervisor, asserted sales were going down even though he had written a month earlier that sales were going from 118,000 tons in 1985 to 130,000 tons in 1986 and "we are currently booking at about 102% of plan" (990).[1]

The Second Circuit further found:

> "On July 9, 1986, while Tyler was on vacation, Janes called and told him to come into the office the next day to meet with both Janes and Sawyer. At that meeting, Janes and Sawyer informed Tyler that Bethlehem was closing its Buffalo Sales Office for economic reasons; and that Tyler was to be permanently laid off. Tyler asked if there was any possibility of a transfer to the Pittsburgh Sales Office, but Janes and Sawyer said there were no transfer possibilities." 958 F.2d at 1178-1179.

Contrary to Bethlehem's assertion that Tyler was only interested in transfer to Pittsburgh, Tyler testified that he asked Janes and Richard Sawyer ("Sawyer"), Central Region Manager who supervised both Janes and deHaven, about the possibility of a transfer "to Pittsburgh or any place" (137).

---

[1] Numbers in parenthesis refer to pages in the Joint Appendix filed with the Second Circuit.

Bethlehem's petition asserts, contrary to Sawyer's testimony and to the Second Circuit, that at the time of Tyler's layoff in July of 1986, there were no vacant sales positions within Bethlehem. The Second Circuit found:

> "In fact, a short time before Tyler's termination, Sawyer had inquired of deHaven about a transfer for Tyler. *Although there was an opening in the Pittsburgh office* at that time, deHaven said he was going to transfer Frank Weber, a 47-year old customer sales assistant, into that position. However, Weber was not transferred, and the Pittsburgh sales position was left vacant until October 1, 1986, when it was given to David Moules, a 26-year old wire salesman with only four years' service .... Thus, Bethlehem fired the 48-year old Tyler after denying his request for a transfer to Pittsburgh, a transfer it soon gave to a relatively inexperienced, disgruntled salesman barely half Tyler's age." 958 F.2d at 1179 [emphasis added].

The Second Circuit's finding mirrors Sawyer's testimony (793-794, 617-618). The record, including Sawyer's testimony and Tyler's work in Pittsburgh for six months prior to this termination supports the conclusion that *there was an opening on July 10, 1986*. No Bethlehem witness or exhibit supports Bethlehem's assertion that there was not.

Bethlehem asserted that Tyler was ineligible for transfer, based on the testimony of Daniel Land ("Land"). Sawyer testified, contrary to Land, that Land did not make transfer decisions (820-821). Those decisions were made by Sawyer's superior, Richard Boulinger ("Boulinger") together with Adams Moore (821). At the time of Tyler's layoff, Sawyer had told Boulinger about Tyler's performance improvement (824-825). According to Sawyer, Boulinger knew that Tyler was a very good salesman and was eligible for transfer at the time of his layoff.

Sawyer testified that deHaven selected David Moules ("Moules") instead of Tyler for the transfer to Pittsburgh (828-

830). Sawyer accepted deHaven's evaluation and recommendation, and made no independent evaluation himself (828). DeHaven never testified during the trial, and the court gave the jury an adverse inference instruction (948). Contrary to Bethlehem, there is no evidence why deHaven transferred Moules. Under the circumstances, the jury could conclude that it was Tyler's age which caused Moules to be selected.

The Second Circuit made the following findings about Bethlehem's transfer practices at the time of Tyler's layoff:

> "Between July 1986 and November 1987, Bethlehem transferred a total of 13 sales people all of them younger than Tyler. One of the two oldest was Weber, who finally gained the Pittsburgh sales position when Moules quit. In making its transfer decisions, Bethlehem relied on several factors, one of which was the performance appraisal, several of which referred to the employees' 'youth' in a positive manner. One candidate, 25 years old at the time was given the following accolade:
>
> All indications point to 'Young Tiger' classification. We will continue to follow closely; feel we have a future 'High Potential' individual here."

After Tyler was fired, Bethlehem hired 12 new sales representatives and put them through Bethlehem's training program. Ten of the 12 were hired directly from college campuses. Daniel Land, Bethlehem's manager of sales and marketing administration, explained why:

> "[W]e have had a lot of unplanned attrition during the time period of 1982 to the present. We have seen the demographics of our sales organization shift gradually upwards so that, as I [explained] earlier, some 56, 57 percent of our sales force is now between the ages of 45 and older. *** [W]e are providing for the time when our sales force continues to age and gets to be — a greater percentage of them that are currently eligible for retirement than become eligible for retirement." 958 F.2d at 1179.

SUMMARY OF ARGUMENT

The Second Circuit decided this case entirely under New York law. Because the Second Circuit did not interpret any federal statute, no federal question was raised. Bethlehem's assertion that "direct evidence" means non-"circumstantial" evidence is erroneous. The Second Circuit correctly concluded that "direct evidence", in an employment discrimination context, means evidence which does not rely on an inference created in accordance with *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973).

The Second Circuit correctly concluded that if a plaintiff produces evidence from which a reasonable jury could conclude adverse employment consequences were "because of" an impermissible factor, an employer affirmative defense instruction was proper. This conclusion is consistent with this Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and with most circuit panels. Those few who have ruled otherwise have incorrectly read "direct evidence" to mean non-"circumstantial" evidence.

Bethlehem's assertion that evidence of discriminatory salesman transfer and hiring practices are "discrimination in the air" unrelated to Tyler's termination is based on its false statement of evidence. Bethlehem asserts, contrary to the Second Circuit and record evidence, that there were no salesman openings when Tyler was terminated. Contrary to Bethlehem, there was at least one opening and the jury correctly concluded that Tyler was denied transfer to it because of Bethlehem's discriminatory practices.

Bethlehem's attorneys could not reasonably believe this Court would grant certiorari to review the Second Circuit's interpretation of New York law based in part on federal caselaw. Similarly Bethlehem's attorneys could not reasonably believe this Court would grant certiorari to review the Second Circuit's evidentiary

conclusions, especially where Petitioner's evidentiary assertions are not supported by any record evidence. Thus damages are appropriate.

ARGUMENT

I. The Second Circuit's decision is based entirely on state law, so it is inappropriate for review.

The Second Circuit noted:

> "While this action was commenced as a diversity action under New York's Human Rights Law, see N.Y. Exec. Law §§290-301 (1982 and Supp. 1992), both parties agree that the elements of proof of liability for a case commenced under §297(9) have been the same as those required under the Federal Age Discrimination in Employment Act ('ADEA'); New York courts have consistently looked to federal caselaw in expounding the Human Rights Law .... For this reason, we may analyze the jury instruction issue as if it were a case commenced under the ADEA or title VII." 958 F.2d at 1180.

Thus the Second Circuit used principles derived from federal employment discrimination caselaw to evaluate the district court's New York's Human Rights Law jury instructions.

This Court has regularly accepted interpretations of state law in which the district court and the court of appeals have concurred. In *Bishop v. Wood*, 426 U.S. 341 (1976), a former police officer asserted he had a property interest in his job since he was a permanent employee. This Court noted that on its face the ordinance on which the police officer relied could fairly be read to create a guarantee of continuing employment. Accepting the contrary statutory interpretation of the district court and court of appeals this Court stated:

> "In comparable circumstances, this Court has accepted the interpretation of state law in which the district court and the court of appeals have concurred even if an examination of

> the state law issue without such guidance might have justified a different conclusion." 426 U.S. at 347.

The decision should be no different in this case. The Second Circuit has done no more than to conclude, under the facts and circumstances of this case, that the correct New York jury instruction included an instruction with regard to Bethlehem's affirmative defenses.

Because this case involved no question of federal law, the Second Circuit was not required to decide what the outcome would have been had the case been brought under ADEA. Thus it is distinguishable from such cases as *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), where the state court was required to determine whether a drug had been "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act. In this case, the principles applied by the Second Circuit are not derived from any federal statute. They are derived from federal decisions on how discrimination can be proved.

The Second Circuit concluded that if Tyler's case had been tried in a New York court, New York law would have required an instruction on Bethlehem's affirmative defense. Bethlehem's liability was not dependent on whether a similar instruction would have been appropriate under ADEA. Because this case raises no issue of federal law, it is not appropriate for certiorari.

II. The Second Circuit's analysis of the district court's jury instruction is consistent with *Price Waterhouse v. Hopkins* and with decisions in other circuits.

Bethlehem asserted to the Second Circuit that the phrase "direct evidence", as used in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), 109 S.Ct. 1775, meant non-"circumstantial" evidence. 958 F.2d at 1183. In fact the phrase "direct evidence" has never meant non-"circumstantial" evidence in employment discrimination law.

In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court stated that plaintiff could win her case in one of two ways:

> "She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, 411 U.S. at 804–805 ...." *Id.* at 257.

Thus "direct evidence", in an employment discrimination context, is evidence which does not rely on an inference created in accordance with *McDonnell Douglas Corp. v. Green*, *supra*.

Once it is clear that "direct evidence" is any evidence, including circumstantial, which does not rely on a *McDonnell Douglas* inference, much of the confusion to which the Second Circuit referred is eliminated. Justice O'Connor's carefully worded concurrence in *Price Waterhouse v. Hopkins* uses the phrase "direct evidence" to mean evidence not requiring a *McDonnell Douglas* inference. Confusion among the circuits has arisen solely because some panels have read the phrase to mean non-"circumstantial" evidence. Justice O'Connor states:

> "In my view, in order to justify shifting the burden on the issue of causation to the defendant, a dispirit treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." 109 S.Ct. at 1804.

The Second Circuit adopted Justice O'Connor's formulation in this case.

The Second Circuit noted that Judge Curtin told the jury Tyler had to prove that age was a "motivating factor" and concluded:

> "To summarize and repeat: *Price Waterhouse* does not require, in a jury trial, 'direct evidence' of discriminatory animus (at least not in the sense of 'direct' and 'circumstantial' evidence). What is required is simply that the plaintiff sub-

> mit enough evidence that, if believed, could reasonably allow a jury to conclude that the adverse employment consequences were 'because of' an impermissible factor." 958 F.2d at 1187.

This statement of the law is nearly identical to Justice O'Connor's statement and is in no way inconsistent with decisions among the circuits, except those few decisions which mistakenly conclude that direct means non-"circumstantial".

III. The Second Circuit's factual analysis of Bethlehem's discriminatory transfer is supported by record evidence; Bethlehem's analysis is supported by none.

Bethlehem asserts that its policy of hiring new college graduate sales trainees to bring down the average age of its sales force is not evidence that Tyler was discriminated against. Similarly, Bethlehem argues that reliance, when making transfers on performance appraisals which categorized some transferees as "young tigers" is also not evidence that Tyler was discriminated against. These assertions are based on Bethlehem's unstated premise. The premise, with no factual support, that because there were no sales jobs to which Tyler could have transferred, he was unaffected by Bethlehem's youth preference in making transfers or filling sales jobs.

Contrary to Bethlehem, there was ample evidence to support the jury's conclusion that Bethlehem had an opening in Pittsburgh which it denied to Tyler and held open until it could transfer the 26-year old Moules. In evaluating Bethlehem's assertions, the Second Circuit stated:

> "To reverse, we must be satisfied, without benefit of credibility findings, that the evidence is so one-sided and contrary to the jury's verdict that there is only one reasonable conclusion as to proper judgment." 958 F.2d at 1187.

Evidence of an opening in Pittsburgh on July 10, 1986 included

Sawyer's testimony that he asked deHaven about transferring Tyler to that opening before he was laid off. It also included Tyler filling the opening on a one week a month basis for about six months prior to his termination. No evidence at all supports Bethlehem's bald assertion that the opening did not exist.

Based on the evidence, the Second Circuit found:

> "Bethlehem fired the 48-year-old Tyler after denying his request for a transfer to Pittsburgh, a transfer it soon gave to a relatively inexperienced, disgruntled salesman barely half Tyler's age." 958 F.2d at 1179.

The Second Circuit then turned to a consideration whether age was a criterion Bethlehem used in making transfers such as the one Tyler was denied.

Analyzing the jury's necessary conclusions in support of its verdict, the Second Circuit held:

> "These conclusions are amply supported by the evidence. Bethlehem's own witness, Daniel Land, testified that Bethlehem's sales force was getting too old; Tyler's layoff helped decrease the average age of Bethlehem's work force. The internal memorandum recommending Tyler's layoff listed his age and years of service. The position which Tyler was filling in Pittsburgh, on a part-time basis, was left unfilled until Bethlehem could place the 26-year-old Moules in it. The performance appraisals of Bethlehem employees who *were* allowed to transfer indicate not only that they were all younger than Tyler, but also that Bethlehem had a special category of employees known as 'young tigers' — an evaluative category from which a long-in-the-tooth employee like Tyler was by definition excluded." 958 F.2d at 1186-1187.

IV. This Court should award Tyler damages.

Bethlehem has petitioned for certiorari in a case decided by the Second Circuit Court of Appeals entirely under New York law. Bethlehem does not assert that the Second Circuit's decision was

so clearly erroneous as to require the exercise of this Court's supervisory powers. Instead, Bethlehem argues that certiorari is proper because guiding principles from federal decisional law were used to interpret New York's Human Rights Law. This Court has never suggested that certiorari would be granted on this basis, and no attorney could reasonably believe that it would.

Underlying Bethlehem's entire petition is its assertion, contrary to the Second Circuit, that at the time of Tyler's layoff in July of 1986, there were no vacant salesmen positions within Bethlehem. In this case, the Second Circuit affirmed Judge Curtin's refusal to grant judgment n.o.v., so this Court's two court rule applies. In *Goodman v. Luckens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987), this Court stated:

> "What the conduct of the Unions had been and whether they had treated blacks and whites differently were questions of historical fact that Federal Rules of Civil Procedure 52(a) enjoins appellate courts to accept unless clearly erroneous .... The court of appeals did not set aside any of the district court's findings of fact that are relevant to this case. That is the way the case comes to us, and both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task. Nothing the Unions have submitted indicates that we should do so."

Bethlehem's bald assertion that there were no salesmen openings at the time of Tyler's layoff is supported by absolutely no evidence. No one during the entire course of the trial ever contradicted Sawyer's testimony that he asked deHaven if he wanted Tyler for the Pittsburgh opening, that deHaven told him he intended to fill the job with Frank Weber ("Weber"), and that Weber did not fill the job which remained open until the 26-year old Moules was transferred into it.

Bethlehem's attorneys could not reasonably conclude this Court would grant certiorari to review a case decided entirely un-

der New York law simply because some principles from federal decisional law were borrowed as New York's highest court said was proper. Bethlehem's attorneys could not reasonably believe this Court would grant certiorari to review a question of fact both the district court and the court of appeals found against Bethlehem, and especially in the absence of any evidence whatsoever to support Bethlehem's factual assertion. Thus this petition for certiorari is frivolous. It was interposed solely to avoid paying the damages owed to Tyler. For these reasons damages and costs are appropriate.

CONCLUSION

Bethlehem's petition for writ of certiorari to the Second Circuit Court of Appeals should be denied and damages and costs should be imposed on Bethlehem, its attorneys, or both.

DATED: Buffalo, New York
June 17, 1992.

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